(15)

Supreme Court, U.S.
FILED
SEP 30 1997
CLERK

No. 96-1400

In The

Supreme Court of the United States

October Term, 1996

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

Petitioner,

vs.

DEEP SEA RESEARCH, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

STUART M. GORDON
FLETCHER C. ALFORD*
DAVID COLLINS
GORDON & REES, LLP
Attorneys for Respondent
20th Floor
Embarcadero Center West
275 Battery Street
San Francisco, CA 94111
(415) 986-5900

* *Counsel of Record*

Of Counsel:

DAVID J. BEDERMAN
SCOTT D. QUESENBERRY
Gambrell Hall
Atlanta, GA 30322-2770
(404) 727-6822

72125
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, Inc.

BEST AVAILABLE COPY

69 pp

QUESTIONS PRESENTED

1. May a state intervene in an *in rem* federal admiralty action and, merely by asserting a bald and unsubstantiated claim to the shipwreck that is the subject of the action, and not in the state's possession, thereby transform the action into a suit "against a state" barred by the Eleventh Amendment, leaving plaintiff without a meaningful remedy for the vindication of its federal rights?

2. Is California Public Resources Code § 6313 preempted to the extent that it purports to vest the State of California with title to shipwrecks that do not meet the criteria set forth in the Abandoned Shipwreck Act?

3. Did the District Court and the Court of Appeal clearly err in their factual findings that the shipwrecked vessel *Brother Jonathan* is neither abandoned nor embedded in the sea floor, and thus, that the Abandoned Shipwreck Act (43 U.S.C. § 2101, *et seq.*) does not apply here?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iv
Statement of the Case	1
Shipwreck Law	1
The Proceedings Below	8
Summary of Argument	17
Argument	20
I. The District Court Did Not Err In Holding An Evidentiary Hearing To Determine Whether The ASA Applies To The *Brother Jonathan*.	20
A. Because Petitioners Argued That The ASA Deprived The District Court Of Its Subject Matter Jurisdiction, It Was Incumbent Upon The District Court To Determine Whether The ASA Applies To The Brother Jonathan.	20
B. Petitioners Did Not Establish That This Is An Action "Against The State" For Purposes Of The Eleventh Amendment.	22

Contents

	Page
II. Federal Law Preempts Petitioners' Statutory Claim Of Title To Shipwrecks Expressly Excluded From The ASA.	36
A. Preemption Doctrine Under Federal Maritime Law.	37
B. The ASA Quitclaims Only A Limited Class Of Shipwrecks To The States And It Would Contravene Congressional Intent To Permit States To Claim Title To Other Shipwrecks On Submerged Lands Over Which The United States Has Paramount Sovereign Authority.	38
C. California Public Resources Code § 6313 Plainly Conflicts with the ASA.	39
D. The General Federal Maritime Law Specifically Preserved By The ASA Also Preempts California Public Resources Code § 6313.	40
III. The Courts Below Did Not Clearly Err In Their Conclusion That There Was Insufficient Proof Showing The *Brother Jonathan* Is Abandoned.	42
Conclusion	50

Page

TABLE OF CITATIONS

Cases Cited:

Alaska v. Arctic Maid, 366 U.S. 1991 (1961) (taxation) 40

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 6, 37, 40, 41

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 38, 40

Baxter v. Vigo County School Corp., 26 F.3d 728 (7th Cir. 1994) 22

Bennis v. Michigan, 116 S. Ct. 994 (1996) 28

British Consul v. Twenty-Two Pipes, etc., 4 F. Cas. 173 (D.S.C. 1801) 34

California v. Arizona, 440 U.S. 59 (1979) 30

Christy v. Penn. Turnpike Comm'n, 54 F.3d 1140 (3d Cir. 1995) 22

Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981) 35

Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir. 1992) 4, 5, 44

Page

Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E. 2d 549 (Mass., 1988) 43, 44

Deep Sea Research, Inc. v. The Brother Jonathan, 883 F. Supp. 1357, *aff'd*, 102 F.3d 379 (9th Cir. 1996) ... *passim*

Delaware v. New York, 507 U.S. 490 (1993) 46

Edelman v. Jordan, 415 U.S. 651 (1974) 23

Ex parte State of New York, 256 U.S. 490 (1921) 23, 24, 25, 26, 27

Ex parte Young, 209 U.S. 123 (1908) 24, 32, 33

Fisher v. The Sybil, 9 F. Cas. 141 (C.C.D. S.C. 1816), *aff'd*, 4 Wheat (17 U.S.) 98 34

Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) 24

Great Western Ins. Co. v. Fogarty, 86 U.S. 640 (1873) 44

Gutierrez v. Waterman S.S. Co., 373 U.S. 206 (1963) . 47

Guzman v. Pichirilo, 369 U.S. 698 (1962) 47

Hamilton v. Brown, 161 U.S. 256 (1896) 46

Hatteras, Inc. v. U.S.S. Hatteras, 1984 A.M.C. 1094 (S.D. Tex, 1981) 43

Contents

	Page
Hess v. Port Authority Trans-Hudson Corporation, 115 S. Ct. 394 (1994)	23
Houseman v. The Cargo of The Schooner North Carolina, 40 U.S. (15 Pet.) 40 (1841)	5, 6, 41
Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028	22, 23, 32, 33, 34
ITSI TV Productions, Inc. v. Agricultural Ass'ns, 3 F.3d 1289 (9th Cir., 1993)	22
Klein v. Unidentified, Wrecked, & Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985)	6
Land v. Dollar, 330 U.S. 731 (1947)	21
MDM Salvage, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel, 631 F. Supp. 308 (S.D. Fla. 1986)	5
Meadows v. Dominican Republic, 817 F.2d 517 (9th Cir. 1987), *cert. den.*, 484 U.S. 976	22
Patapso Ins. Co. v. Southgate, 30 U.S. (5 Pet.) 604 (1831)	44
Prescott v. United States, 973 F.2d 696 (9th Cir. 1992)	22
Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)	23

Contents

	Page
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)	37
Rickard v. Pringle, 293 F. Supp. 981 (E.D.N.Y. 1968)	5
Rounds v. Cloveport Foundry & Machine Co., 237 U.S. 303 (1915)	50
Russell v. Forty Bales of Cotton, 21 F. Cas. 42 (S.D. Fla. 1872)	43
Skiriotes v. Florida, 313 U.S. 69 (1941) (sponge diving)	40
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	37, 40
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	46
The Akaba, 54 F. 197 (4th Cir. 1893)	42
The Captain Lawrence, 105 F.3d 1085	43
The China, 74 U.S. (7 Wall) 53 (1868)	5
The Davis, 77 U.S. 15 (1869)	27
The Harrison, 14 U.S. (1 Wheat) 298 (1816)	43
The MARY, 13 U.S. (9 Cranch) 126 (1815)	50
The Sabine, 101 U.S. 384 (1880)	4

Contents

	Page
The TASHMOO, 1937 A.M.C. 1536 (Arb. 1937)	44
Treasure Salvors, Inc. v. Unidentified, Wrecked And Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978)	6, 29, 35, 43
United States v. California, 332 U.S. 19 (1947)	34
United States v. Peters, 9 U.S. 115 (1809)	24, 28
United States v. State of Alaska, 117 S. Ct. 1888 (1997)	38
United States v. Tyndale, 116 F. 820 (1st Cir. 1902)	34
United States v. United Mine Workers of America, 330 U.S. 258 (1947)	21
Wilkie v. 250 Boxes of Sugar, 29 F. Cas. 1247 (D.S.C. 1796) (No. 17,662)	42
Zych v. The Lady Elgin, 755 F. Supp. 213 (N.D. Ill. 1990)	42
Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be SB "Seabird," 941 F.2d 525 (7th Cir. 1991)	7, 20
Statutes Cited:	
28 U.S.C. § 1330	22

Contents

	Page
28 U.S.C. § 1346	22
28 U.S.C. § 1346(f)	30
43 U.S.C. § 1311	34
43 U.S.C. § 1311(a)	34, 35
43 U.S.C. § 1311(d)	35
43 U.S.C. § 1314(a)	35
43 U.S.C. § 2101, *et seq.*	i, 6
43 U.S.C. § 2105	31
43 U.S.C. § 2105(a)	7, 9, 35, 39, 42
43 U.S.C. § 2105(a)-(c)	37
43 U.S.C. § 2105(b)	43, 45, 46, 48
43 U.S.C. § 2105(c)	7, 35, 39
43 U.S.C. § 2106(a)	7, 36
43 U.S.C. § 2106(b)	7, 38
Calif. Evid. Code § 600(b)	45
Calif. Pub. Res. Code § 6313	i, 7, 8, 12, 14, 15, 18, 39, 40, 41
Calif. Pub. Res. Code § 6313(a)	8, 37

Page

Calif. Pub. Res. Code § 6313(b)-(c) 37

Calif. Pub. Res. Code § 6313(c) 8

United States Constitution Cited:

Article III, Section 2 6

Fifth Amendment 31, 42

Eleventh Amendment ..... *passim*

Rules Cited:

Supplemental Admiralty Rule C(1)(a) 5

Supplemental Admiralty Rule C(4) 50

Other Authorities Cited:

Abandoned Shipwreck Act of 1987, H.R. Rep. 100-514(I), *reprinted in* 1988 U.S.C.C.A.N. 366 ..... 39, 45

Abandoned Shipwreck Act of 1987, H.R. Rep. 100-514(II), *reprinted in* 1988 U.S.C.C.A.N. 365 ..... 35, 38

Black's Law Dictionary (abrgd. 5th ed. 1983) 42, 45

1 *Benedict On Admiralty*, Jurisdiction § 112 (7th rev. ed. 1994) 37

Page

5a Wright & Miller, Federal Practice and Procedure (West 2d ed. 1990), § 1350 21

14 Wright Miller & Cooper, *Federal Practice and Procedure* Admiralty § 3672 (2d ed. 1985) (same) . 37

Gilmore & Black, The Law of Admiralty 532 (2d ed. 1975) 4, 5

H.R. Rep. No. 100-514, 7 *reprinted* 1988 U.S.C.C.A.N. 367 & 375 7

Schoenbaum, Admiralty And Maritime Law, § 15-7 (1987) 43

70 Am. Jur. 2d, Shipping, § 974 (1994) 43

APPENDIX

Appendix A — Report On Salvage Operations On The *Brother Jonathan* Observed Between August 22-25, 1997 ..... 1a

STATEMENT OF THE CASE

a. DSR And Its Discovery Of The Brother Jonathan. In 1987, Donald Knight, president of a company known as Sea Epics, Inc., believed he had located the shipwrecked vessel *Brother Jonathan* based upon certain anomalies in sonar and magnetometer readings. The site was at the base of Jonathan Rock in the Pacific Ocean several miles offshore from Crescent City, California. J.A. 133-134. Using an unmanned submersible craft, Sea Epics made a videotape of the ocean floor near the base of Jonathan Rock, supposedly depicting the wrecked vessel. *Id.* Sea Epics then filed an application with the California State Lands Commission for a permit to recover the wreck. However, in 1988 the Commission issued a "Notice Of Intent To Adopt Negative Declaration" with regard to the application. J.A. 108. Thereafter, Sea Epics became defunct.

Respondent, Deep Sea Research, Inc. ("DSR") is a small, closely-held California corporation. The principals of DSR have been searching for the *Brother Jonathan* for more than 20 years. Although Knight (the former President of Sea Epics) briefly served as President of DSR, he is no longer associated with the company. None of DSR's current officers, directors, or shareholders were officers, directors, or shareholders of the now-defunct Sea Epics.

In 1991, relying upon the Sea Epics data, DSR filed an *in rem* admiralty action against the wreck of the *Brother Jonathan* in the United States District Court for the Northern District of California, seeking to establish its rights to the wreck under the federal admiralty laws of salvage and finds.[1] However, DSR subsequently dismissed the action without prejudice after determining that the Sea Epics video and sonar images were not in fact the wreck of the *Brother Jonathan*, but rather were simply naturally-occurring rock formations. Voluntary Dismissal, Docket No. 23; Siverts Declaration, J.A. 133-134. Despite that temporary setback, DSR continued to search for the wreck. Its efforts were finally rewarded when, in October of 1993, the company discovered the wreck resting

1. J.A. 37, *et seq.* For a discussion of *in rem* admiralty actions and the laws of salvage and finds, *see infra* at 4-6.

on the ocean floor beneath several hundred feet of water, approximately 4 ½ miles off the coast of Crescent City, California — several miles from the location depicted in Sea Epics' videotape and sonar readings. J.A. 134-135. It is entirely undisputed that DSR was the first finder of the *Brother Jonathan*. Until DSR discovered the wreck, neither Petitioners nor anyone else knew its actual location. Petitioners have never made any effort whatsoever to locate the wreck or to conduct any research regarding its location or condition. *See Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 381-382 (9th Cir. 1996); Foster Testimony, J.A. 274-275. Indeed, Petitioners still do not know the location of the wreck — only that it is somewhere within the 2-mile circle of ocean described by DSR in its court papers. J.A. 414-415.

Following confirmation of the discovery, DSR reopened its admiralty *in rem* case against the wreck. Stipulation And Order Reopening Case, Docket No. 25.

b. DSR Obtains An Ownership Interest In The Wreck. DSR's historical research revealed that several insurance companies paid claims for loss of the *Brother Jonathan* and its cargo as a result of the sinking. Those insurance companies took title to the wreck by operation of law, under the principle of subrogation. The two insurance companies that paid the greatest share of the claims on the wreck assigned their title to DSR by a written contract, which is part of the record below. In that contract, the insurance companies warranted that they had not abandoned their title to the shipwreck prior to assigning that title to DSR. J.A. 148, *et seq*. Accordingly, DSR now holds an ownership interest in the wreck.[2]

c. DSR's Work At The Wreck Site. Petitioners and their amici suggest that private companies are incapable of properly recovering historic shipwrecks, and that such matters can be properly handled only by governments. One may debate the relative merits of private enterprise versus government bureaucracies. That aside, however,

2. Petitioner cites a newspaper article published shortly after the sinking, which indicated that a portion of the cargo of the vessel was insured. J.A. 145. Petitioners infer from this that the vessel itself was not insured. However, the newspaper article does not so state, and there is no evidence in the record showing that the vessel itself was not insured.

the simple fact remains that there is not a *single shred* of evidence in this record indicating that DSR's work on the wreck has been conducted in an unprofessional manner or has in any way impaired the historical value of the wreck. Indeed, all of the evidence in the record is clearly to the contrary. DSR has retained a professional archaeologist, and under his supervision has meticulously studied, mapped, photographed, and videotaped the wreck using the latest available technology. *See* Memorandum And Order Denying Motion For Stay, Opp. Cert. App. "A", 6a-7a, 11a, 15a. Under the District Court's close supervision, DSR has recovered over 1,000 gold coins and several hundred historic artifacts from the wreck to date. All of the recovery work has been conducted under the archaeologist's supervision, and has been done carefully, professionally, in a non-destructive manner, and with minimum impact upon the historical value of the wreck. *See* Declarations of James R. Reedy, Jr., David L. Flohr, Willard Bascom, Herbert D. Bump, and Gary Gentile, filed with this Court in connection with DSR's Opposition To Petitioners' Motion For Stay/Injunction.

The items recovered to date are currently being treated and restored at an artifact conservation laboratory in Crescent City (the city nearest the wreck site). The laboratory was established by DSR, and is funded solely by the company. The facility is operated jointly by DSR and volunteers from the local Del Norte County Historical Society under the supervision of a professional artifact conservation expert. J.A. 362, *et seq*. Artifacts that have completed the conservation process are on public display at the Del Norte County Historical Society's museum in Crescent City. J.A. 360-361, and 364, ¶ 11. DSR has pledged to donate these artifacts to the Historical Society if this litigation is concluded in DSR's favor. J.A. 364, ¶ 11.

Renowned nautical historian Gary Gentile has been appointed by the District Court as a neutral observer and expert to monitor the recovery operation. *See* June 10, 1996 Order, at Docket No. 118. Mr. Gentile has personally observed DSR's work at the wreck site, and he reports that the work is being done in an appropriate and completely professional manner. *See* August 30, 1997 Report, attached as an appendix to this brief. *See also* Mr. Gentile's

Declaration filed with this Court in connection with DSR's Opposition To Petitioners' Motion For Stay/Injunction, at ¶ 8.

No artifacts recovered from the wreck have been sold or otherwise disposed of. *See* November 5, 1996 Order, at Docket No. 137; Declaration of David L. Flohr, filed by DSR with this Court in connection with DSR's Opposition To Petitioner's Motion For Stay/Injunction, at ¶ 2. However, DSR's efforts have been extremely costly. The expenses incurred by DSR to date in locating the wreck, mapping and photographing it, and recovering and treating the artifacts significantly exceed $1 million dollars. The company's funding has come piecemeal from over 100 individual investors, mostly people of modest means — plumbers, mechanics, small-business owners, and retirees. To date, these investors have yet to see a single penny of return on their investment. Declaration of David L. Flohr, filed by DSR with this Court in connection with DSR's Opposition To Petitioner's Motion For Stay/Injunction, at ¶ 3.

No funding has been provided by Petitioners, their amici, or any other governmental entity. Indeed, Petitioners readily admit that they have neither the resources nor the technological capability to recover the wreck, to preserve its artifacts, or even simply to safeguard it from vandals and pillagers.

SHIPWRECK LAW

a. The Law Of Salvage. The law of salvage is of ancient vintage. *See* Gilmore & Black, The Law of Admiralty 532-33 (2d ed. 1975). Under the law of salvage,

> compensation [is] allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of ship wreck, derelict or recapture.

The Sabine, 101 U.S. 384 (1880). Under the law of salvage, the original owner of the imperiled vessel retains title thereto, but the salvor is entitled to a liberal salvage award from the *res* of the vessel. *Columbus-America Discovery Group v. Atlantic*

Mutual Ins. Co., 974 F.2d 450, 459 (4th Cir. 1992). The vessel itself is deemed to be liable for satisfaction of the salvage award, apart from any liability of its owner. *See The China*, 74 U.S. (7 Wall) 53 (1868). The courts have recognized that liberal salvage awards further the fundamental public policy of encouraging salvage and recovery efforts, and rewarding those who engage in laborious, costly, and potentially dangerous undertakings for the public benefit.[3]

By operation of law, the salvor has a maritime lien against the *res* of the recovered vessel and its cargo. *See* Gilmore & Black, *supra*, at 628, and cases cited therein. The salvor enforces the lien by bringing an *in rem* action in federal admiralty court against the vessel and its cargo. *See* Supplemental Admiralty Rule C(1)(a). As explained by Chief Justice Taney in the case of *Houseman v. The Cargo of The Schooner North Carolina*, 40 U.S. (15 Pet.) 40

3. *See Rickard v. Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968); Gilmore & Black, *supra*, at 532 (citing numerous cases).

Despite its ancient origins, the law of salvage has readily evolved to meet modern concerns regarding preservation of historic shipwrecks. *See, e.g., MDM Salvage, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 631 F. Supp. 308, 310-311 (S.D. Fla. 1986), where the district court denied the applications of two different commercial salvors to recover property from a Spanish galleon, noting that neither firm had attempted to preserve the "archaeological integrity" of the wreck. *See also Columbus-America Discovery Group*, 974 F.2d 468 (where the court made clear that the salvor's fidelity to archaeological values is among the elements to be considered in determining the amount of the salvage award).

In appointing DSR exclusive salvor of the *Brother Jonathan*, the district court in this case made a factual finding that DSR has undertaken adequate measures to preserve the wreck's archaeological and historical values. *See* Pet. App. A53-A54. *See also* Op. Cert. App., 11a. The district court also warned that "the amount of any recovery that DSR may ultimately receive as a salvage award, will be contingent upon DSR's preservation of the historical and archaeological value of the *Brother Jonathan* and its cargo." *See id.*

Thus, modern admiralty law in general, and as applied to this case in particular, provides ample incentives and safeguards for the appropriate treatment of historic shipwrecks.

(1841), *in rem* salvage actions against vessels fall squarely within the *exclusive* admiralty jurisdiction of the federal courts conferred under Article III, Section 2 of the United States Constitution:

> Now, the matter in dispute, is merely a question of salvage. . . . Upon such questions, there can be no doubt of the jurisdiction of a court of admiralty; nor of its authority to proceed *in rem*, and attach the property detained. The admiralty is the only court where such a question can be tried; for what other court, but a court of admiralty, has jurisdiction to try a question of salvage?

Id. at 48. *See also American Dredging Co. v. Miller*, 510 U.S. 443, 446-447 (1994) ("An *in rem* suit against a vessel is, we have said, distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts.")

b. The Law Of Finds. A related legal doctrine is the common law concept of "finds". Under the law of finds, title to property that is abandoned vests in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intention to become its owner." *Treasure Salvors, Inc. v. Unidentified, Wrecked And Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (citations and quotation marks omitted). However, an exception is recognized for items found embedded in the soil; such items are deemed to belong to the landowner, and the finder acquires no ownership interest in them. *See, e.g., Klein v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985).

c. The Abandoned Shipwreck Act. In 1987, Congress enacted the Abandoned Shipwreck Act ("ASA"), 43 U.S.C. § 2101, *et seq.* By its terms, the ASA applies only to shipwrecks that meet each of the following three criteria:

1. The shipwreck must be "abandoned"; and
2. The shipwreck must be located on "submerged lands of a state;" and
3. The shipwreck must be either: a) embedded in the sea floor; or b) listed in the National Register Of Historic Places; or c) formally determined by the Secretary of Interior to be eligible for listing in the National Register of Historic Places.

See 43 U.S.C. § 2105(a). Under the ASA, the federal government asserted title to all shipwrecks that meet each of the above-enumerated criteria. *Id.* The federal government then conveyed that title to the states in or on whose submerged lands such shipwrecks are located. *See* 43 U.S.C. § 2105(c). Thus, in enacting the ASA, the federal government exercised its sovereign prerogative to claim title to shipwrecks that meet the criteria spelled out in the Act, and then conveyed that title to the states on whose submerged lands the wrecks are located. *See* H.R. Rep. No. 100-514 at 3, 7 *reprinted in* 1988 U.S.C.C.A.N. 367 & 375. The ASA specifies that title to such shipwrecks shall no longer be determined under the traditional federal admiralty laws of salvage or finds; however, such laws shall continue to apply to wrecks that do not meet the criteria spelled out in the Act. *See* 43 U.S.C. §§ 2106(a) & (b).

By eliminating the substantive admiralty law of salvage and finds with respect to wrecks that meet its criteria, the ASA effectively divests the federal courts of their admiralty *in rem* jurisdiction over such wrecks; for if the law of salvage does not apply, the salvor has no maritime lien, and without a maritime lien there is no *in rem* jurisdiction. *See Zych v. The Seabird*, 941 F.2d 525, 531 and n.9 (7th Cir. 1991). However, the ASA makes equally clear that the federal courts retain their admiralty jurisdiction over shipwrecks that do not meet the criteria set forth in the Act. *See* 43 U.S.C. § 2106(b) ("This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies."). Thus, Congress cautioned that it

> intend[ed] to carve out a limited exception from general admiralty principles for those classes of shipwrecks to which this Act applies. All other shipwrecks . . . remain subject to the uniform principles of admiralty law, except as may be provided in other federal law.

H.R. Rep. 100-514(II) at 8, *reprinted in* 1988 U.S.C.C.A.N. 365, 377.

d. California Public Resources Code § 6313. In 1989, the California legislature enacted Public Resources Code section 6313.

That statute purports to vest the State of California with title to "all abandoned shipwrecks *and* all archaeological and historic resources on or in the tide and submerged lands of California." Calif. Pub. Res. Code § 6313(a) (emphasis added). The statute further provides that all shipwrecks that have been on the State's submerged lands for more than 50 years shall be presumed to be archaeological and historic resources, and thus shall belong to the State — apparently even if not abandoned. *See* § 6313(c). Unlike the ASA, § 6313 is not limited only to wrecks that are embedded in the sea floor or listed in the National Register of Historic Places.

THE PROCEEDINGS BELOW

DSR brought this *in rem* admiralty action against the *Brother Jonathan* in the United States District Court for the Northern District of California. Neither Petitioners nor any of their officers, agents, or employees are named in the complaint. The complaint does not pray for any monetary or injunctive relief against Petitioners. *See* J.A. 37, *et seq.*

Petitioners now imply, for the first time, that they were summoned and required to appear in the action. *See* Pet. Brf., 11 and n.11. However, that suggestion is belied by the record, which clearly shows that Petitioners *moved to intervene* in the case. *See* J.A. 67, *et seq.* If Petitioners had in fact been summoned to appear they would not have found it necessary to move to intervene. Although DSR mailed a copy of its complaint to Petitioners, Petitioners themselves concede that the purpose of this mailing was not to effect service on Petitioners, but rather was done simply to notify Petitioners of the case. *See* Memorandum In Support Of Motion To Intervene, pg. 2, Docket No. 7.

Over DSR's objection, the district court permitted Petitioners to intervene. *See* J.A. 76, *et seq.* Thereafter, the United States also intervened in the case — purportedly to defend the constitutionality of the ASA, which DSR had challenged in its opposition to Petitioners' motion to intervene. *See* Stipulation And Order Allowing Intervention Of The United States, Docket No. 20.

After Petitioners' motion to intervene was granted, and without otherwise participating in any way in the case or conducting any

discovery, Petitioners moved to dismiss the action. In their motion to dismiss, Petitioners asserted:

> First, the defendant, the BROTHER JONATHAN is an abandoned shipwreck, eligible for inclusion in the National Historic Register, embedded in the subsurface of the territorial waters of the State of California, and as such the Abandoned Shipwreck Act deprives a federal court of jurisdiction to adjudicate a claim to such a ship based on the law of salvage and the law of finds. 43 U.S.C. § 2106(a).
>
> Second, Plaintiff's action is a suit against the State from which it is immune under the Eleventh Amendment to the United States Constitution.

J.A. 89. In support of their motion to dismiss, Petitioners submitted affidavits from Goodyear K. Walker (an "environmental specialist" with the California State Lands Commission), John W. Foster (an archaeologist with the California Department Of Parks And Recreation), and Roy H. Minnick (a land surveyor with the California State Lands Commission).

Mr. Walker stated in his affidavit that he believes the video and sonar images submitted to the California State Lands Commission by Sea Epics in 1988 depict a vessel "partially embedded" in the ocean floor. J.A. 109. In fact, however, the "partially embedded" object on the video and sonar tapes is not the *Brother Jonathan* at all — but rather simply naturally-occurring underwater rock formations.[4] Foster opined in his affidavit that he believes the *Brother Jonathan* is "eligible for National Register status." J.A. 113. However, the affidavit does not address whether the wreck has been listed in, or formally determined by the Secretary of Interior to be eligible for listing in, the National Register — as required by the ASA. *See* 43 U.S.C. § 2105(a). Minnick states in his affidavit that he believes the *Brother Jonathan* is located within California's state

4. J.A. at 133-134. As explained *supra*, DSR discovered the *Brother Jonathan* several miles away from the area depicted in the Sea Epics data.

waters; but his opinion in that regard was based on the 1988 Sea Epics data erroneously placing the wreck at the base of Jonathan Rock. *See* Minnick Declaration, at Docket No. 33.

Petitioners also filed a request for judicial notice, requesting that the district court take judicial notice of the alleged "facts" that the *Brother Jonathan* is located in State waters, is embedded in the sea floor, and is eligible for inclusion in the National Register of Historic Places. J.A. 117, *et seq. However, neither the affidavits nor the request for judicial notice addressed in any way the question of whether the Brother Jonathan is "abandoned" as required under the ASA.*

In its opposition to the motion to dismiss, DSR submitted declarations from Don Siverts, David L. Flohr, Richard Slater, Mark L. Barnum, Arnold Jackson, Douglas Groom, and Willard Bascom. J.A. 132-173. In his declaration, Mr. Siverts stated that he piloted a manned submersible craft in the area at the base of Jonathan Rock that was described in the 1988 Sea Epics permit application and referenced by the Petitioners' affiants in their affidavits. Mr. Siverts stated that there was no shipwreck located in that spot, and that the images portrayed in the sea epics videotape and described by Mr. Walker in his affidavit as a "partially embedded vessel" were in fact partially embedded *rocks*. J.A. 133-134, ¶¶ 4-5. He explained that he discovered the wreck in 1993 while working for DSR, and that its actual location is several miles from the area described by the Petitioners' affiants. J.A. 134-135, ¶¶ 6-7. He stated that he observed the wreck first-hand from the submersible craft, and that the wreck is resting atop the ocean floor, not buried in or firmly affixed to the bottom. J.A. 135, ¶ 8. He also explained that although there is a fine, thin layer of sediment resting on certain parts of the wreck, this sediment is extremely loose and powdery, and can easily be wiped away with a human hand, without the need for any excavating tools. J.A. 136, ¶ 10.

Mr. Sivert's declaration was corroborated by the declarations of Messrs. Barnum, Slater, and Bascom. Mr. Barnum, an offshore navigation and surveying expert who was present at the scene when DSR discovered the *Brother Jonathan*, confirmed the location of the wreck as described by Mr. Sivert.

J.A. 160-161. Mr. Slater (a geologist) and Mr. Bascom (an oceanographer) stated in their declarations that they personally viewed the wreck of the *Brother Jonathan*, and that it is not embedded in the sea floor. J.A. 157 and 171-172.

In his declaration, Mr. Flohr stated that on behalf of DSR he had conducted extensive historical research regarding the *Brother Jonathan*, and that as a result of this research he discovered that a number of insurance companies had originally paid claims for loss of the *Brother Jonathan* and its cargo as a result of the wreck. He further indicated that DSR had reached an agreement with several of those insurance companies, pursuant to which the companies conveyed all of their right, title, and interest in the wreck to DSR. J.A. 138-140. Attached to Mr. Flohr's declaration was a copy of the written agreement between DSR and the insurance companies. In that agreement, the insurance companies represented that they had paid claims for loss of the *Brother Jonathan*, that they took title to the wreck by subrogation, that they had never abandoned their title, and that they were conveying that title to DSR. J.A. 148, *et seq.*

The declarations of Mssrs. Jackson and Groom describe in detail the significant advances in diving and sonar technology that have occurred within the last several years. They also state that, without those recent advances it would have been extremely difficult — if not impossible — for anyone to locate and recover the *Brother Jonathan*. J.A. 163-169.

The United States also filed a brief with the district court in connection with Petitioners' motion to dismiss. Although nominally limited to the constitutionality of the ASA, the United States' brief in fact was devoted primarily to supporting Petitioners' argument that the case is barred by the Eleventh Amendment.[5]

---

5. *See* Memorandum Of United States In Support Of Constitutionality Of The Abandoned Shipwreck Act, Docket No. 39, at pgs. 12-25. The United States also asserted before the district court that the wreck is not "abandoned". J.A. 306. Now, however, the United States reverses itself on both issues, arguing before this Court that the action is not barred by the Eleventh Amendment, but that the wreck is abandoned. *See* Brief of the United States as Respondent.

In September 1994, the district court held two hearings on the motion to dismiss. The district court explained that "[t]he purpose of the two hearings was not to determine the merits of any party's claim to the *Brother Jonathan*, it was simply to determine whether the ASA and California Public Resources Code § 6313 apply to the *Brother Jonathan*," and thus, whether the Court had jurisdiction to proceed in the matter. 883 F. Supp. 1348 and n.3. The district court recognized that if the *Brother Jonathan* meets the criteria set forth in the ASA, the court would have no jurisdiction over the matter; and the court explained that it "has the jurisdiction to hear matters that decide its own jurisdiction." J.A. 186.

The first hearing focused primarily upon the uncertainty with regard to the location of the wreck. 883 F. Supp. 1348. After a recess of several days, DSR executed a written stipulation attesting that the wreck is located within State waters, but denying that the wreck is embedded in the sea floor. J.A. 204-206, 220-221.

The district court then convened a second hearing to further consider the motion to dismiss in light of the stipulation regarding the location of the wreck. At that hearing, Petitioners elected to present live testimony from two witnesses — Mr. Foster (the archaeologist who executed one of the affidavits attached to Petitioners' moving papers), and one Rand Herbert, a state historian. J.A. 225-273. Although Mr. Foster testified that he believes the wreck is embedded, he admitted that his opinion in that regard was based solely on a videotape DSR submitted to the Court depicting the wreck — a different videotape than the one relied upon by Mr. Walker in his affidavit. J.A. 266-267. He testified that he believes the wreck is embedded simply because in the videotape he could not see the lower portion of the wreck's hull. *Id.* However, Mr. Foster admitted that he does not have any information regarding the consistency of the sea floor in the vicinity of the wreck, and does not know whether the sediment is hard or loose. J.A. 270. Moreover, he admitted that the portions of the wreck that are visible in the videotape are covered only by a fine layer of silt that can easily be disturbed by the mere wipe of a human hand. *Id.* He also testified that Petitioners had never done anything to locate the *Brother Jonathan* or to nominate it for listing in the National Register of Historic Places. J.A. 268-269, 275.

The only evidence submitted by Petitioners' on the issue of abandonment was the testimony of Mr. Herbert, the historian. He testified that he began his research on the *Brother Jonathan* only one week before the hearing, and that his research consisted solely of several hours spent in the library. J.A. 245-246. At one of those libraries, the entire collection of materials on California history was being moved and was inaccessible to him, which he described as a "severe impediment" to his brief research. J.A. 230. He admitted that he did not know whether or not the original owners of the *Brother Jonathan* had undertaken any efforts to search for or recover the wreck. J.A. 247-248. However, his research did indicate that a number of efforts were made — by whom he cannot say — to recover the wreck. J.A. 247-248. He found no evidence that the original owners had disclaimed their interests in the wreck. J.A. 246. He testified that he conducted no research whatsoever regarding the insurance companies that insured the wreck, and made no effort to contact them. J.A. 250. He does not know whether the insurance companies ever attempted to recover the wreck. *Id.*

Petitioners argued that their evidence established that the *Brother Jonathan* meets the criteria set forth in the ASA, giving Petitioners a "colorable claim" to the wreck. Petitioners argued that this "colorable claim" rendered the case barred by the Eleventh Amendment. J.A. 199, 225, 278-279.

DSR submitted no testimony at the hearing, choosing instead to rely upon the declarations it had previously submitted. J.A. 276. After hearing all of the evidence, the district court issued a lengthy, comprehensive memorandum and order denying the motion to dismiss. The district court concluded that the evidence showed overwhelmingly that the shipwreck was not abandoned, not embedded in the sea floor, and not listed in or determined eligible for listing in the National Register of Historic Places.[6] Accordingly,

6. Petitioners assert in their brief that the *Brother Jonathan* has now been determined eligible for listing in the National Register of Historic Places. Pet. Brf. 4-5. In fact, Petitioners nominated the entire 2-mile-wide circle of ocean described by DSR in its court papers for inclusion in the National Register as a "wreck site." *See* J.A. 414-415. However, (Cont'd)

the district court concluded that because the shipwreck does not meet the criteria set forth in the ASA, Petitioners have no claim to the wreck under the ASA and this *in rem* action is not barred by the Eleventh Amendment as an action "against a state." 883 F. Supp. 1357. The district court also ruled that California Public Resources Code § 6313 is preempted by the ASA, to the extent that it purports to grant California title to a class of shipwrecks broader than that encompassed by the ASA. 883 F. Supp. 1357-1359.

The district court then issued an order appointing DSR custodian and salvor of the wreck. 883 F. Supp. 1361-1365. However, the district court specifically declined to decide who owns the *Brother Jonathan*. 883 F. Supp. 1354, 1365.

The district court has never issued any order compelling or restraining any action on the part of Petitioners.[7] Nor has the district court ever issued any order precluding the possibility that Petitioners have some regulatory authority over the recovery operation. In fact, the district court specifically recognized that Petitioners may have such authority. J.A. 217.

After the district court issued its ruling, the federal government filed with the district court a "Claim of Ownership", stating *under*

(Cont'd)
it is undisputed that Petitioners did not even file their National Register nomination until August 1995 — *after Petitioners filed their notice of appeal to the Ninth Circuit in this case. See* J.A. 372-375. Thus, the Nomination appears to stem more from Petitioners' belated attempt to gain an advantage in the litigation than from any eleemosynary interest in historic preservation. Because the National Register nomination was not part of the record before the district court, and because the Ninth Circuit declined to take judicial notice thereof (102 F.3d 389), the Nomination is not properly part of the record before this Court and it is improper for Petitioners to raise that issue here.

7. The district court's April 18, 1995 order enjoins all "competing salvors" and "would-be salvors" from conducting diving or salvage operations on the *Brother Jonathan*. J.A. 300. However, by their own assessment, Petitioners do not fit that description. Indeed, in a subsequent order the district court made clear that state government authorities acting in the course of their official duties are not excluded from the wreck site. *See* Order Re. Motion To Amend Injunction, at Docket No. 115.

penalty of perjury that there was various unspecified property of the federal government aboard the *Brother Jonathan* at the time of its sinking, that the federal government is the "true and bona fide sole owner" of such property, and that the property has "never been abandoned." J.A. 305-307.

Petitioners then appealed to the Ninth Circuit, which unanimously affirmed. 102 F.3d 379. The appellate court agreed that California Public Resources Code § 6313 is preempted to the extent it purports to vest the State with title to shipwrecks not encompassed by the ASA. The court explained that Congress, in enacting the ASA, made clear that the states receive title to only those shipwrecks meeting the criteria spelled out in the Act; title to all other shipwrecks continues to be governed by federal admiralty law and such non-qualifying shipwrecks remain subject to the exclusive *in rem* admiralty jurisdiction of the federal courts. 102 F.3d 384. Accordingly, § 6313 is preempted to the extent that it purports to give the State title to shipwrecks that are reserved by the ASA for the exclusive *in rem* jurisdiction of the federal courts. *Id.*

Turning to the Eleventh Amendment issue, the Ninth Circuit held that the district court had properly required Petitioners to prove that the ASA applies to the *Brother Jonathan*. The appellate court explained:

> [A] federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction. [citations]. Therefore, it was appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan*, *i.e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case. Otherwise, as DSR points out, the State could receive immunity simply by asserting that it was entitled to it. For a federal court to renounce jurisdiction over an admiralty case on the basis of a mere assertion of entitlement to immunity on the part of the State is inconsistent with the court's duty to assess whether it has jurisdiction.

102 F.3d 386. The Ninth Circuit also addressed the State's assertion that the district court erred in considering the merits of Petitioners' claim to the *Brother Jonathan* in the context of its Eleventh Amendment analysis: "We find that . . . the party asserting immunity has the burden to establish that it is entitled to immunity even if the determination of that issue touches the merits of the claim." 102 F.3d 387. The appellate court also explained that the district court did not impermissibly adjudicate Petitioners' rights in the course of determining whether the *Brother Jonathan* meets the criteria spelled out in the ASA:

> The ASA does not vest title to wrecks that satisfy its requirements directly in the state. Rather, it provides that the *federal* government may assert title to such wrecks. *See* 43 U.S.C. § 2105(a). Only after the federal government takes title to the abandoned shipwreck may title then be transferred to the state. 43 U.S.C. § 2105(c). Thus, a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment.

Id. (Emphasis in original; footnote omitted).

Finally, the Ninth Circuit concluded that the district court did not clearly err in finding that the *Brother Jonathan* was not "abandoned" for purposes of the ASA. The appellate court noted that abandonment could be found either by an express renunciation of title by the owner, or by circumstances giving rise to an inference that the owner has relinquished title — such as the passage of time without any effort on the owner's part to recover the wreck. 102 F.3d 387-88. After carefully reviewing the evidence, the Ninth Circuit concluded that the district court did not clearly err in finding that the wreck was unabandoned. *Id.*

The Ninth Circuit also rejected Petitioners' argument that the allegedly uninsured portions of the wreck should be deemed abandoned:

> We decline to divide the wreck of the *Brother Jonathan* into abandoned and unabandoned portions for purposes of the ASA for two reasons. First, if we were to find

> that the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the *Brother Jonathan*. It is unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA.
>
> Second, such an approach is inconsistent with the general rule in maritime law of treating wrecks as a legally unified *res*. . . .

102 F.3d 389. Although the Ninth Circuit concluded that the presence of a significant amount of non-abandoned property on the *Brother Jonathan* precluded a finding that the wreck was abandoned, the court specifically reserved for another day "the question of whether there is some point at which the portion of the wreck that is [unabandoned] becomes so negligible that the wreck might be considered abandoned for purposes of the ASA." *Id.*

SUMMARY OF ARGUMENT

I. Petitioners intervened in this case, asserted that the ASA applies to the *Brother Jonathan*, and claimed that the ASA divests the district court of its subject matter jurisdiction over the case. There was conflicting evidence with regard to whether the *Brother Jonathan* meets the ASA criteria. Under these circumstances, the district court did not err in holding an evidentiary hearing to determine whether the ASA applies to the *Brother Jonathan*. Indeed, Petitioners' jurisdictional challenge mandated that course.

Where, as here, the state is not named as a party to the suit, determining whether the action is barred by the Eleventh Amendment as a suit "against a state" entails an examination of all of the facts and circumstances of the case, in light of the twin purposes of the Eleventh Amendment; prohibiting unconsented raids on state treasuries, and respecting state sovereignty by protecting states from the indignity of compulsory federal process. Also relevant is the competing need to provide a forum for the vindication of important federal interests. Those considerations uniformly point against application of the Eleventh Amendment here. In this case, neither

Petitioners nor any of their officers, agents, or employees are named in the complaint. DSR does not seek any monetary relief of any kind against Petitioners or any of their officers, agents, or employees. Nor does DSR seek an order dispossessing Petitioners of property within their possession. Furthermore, because *in rem* admiralty suits against vessels are within the exclusive jurisdiction of the federal courts, a dismissal of this case would leave plaintiff with no meaningful remedy for the vindication of its rights under federal admiralty law. Finally, because Petitioners' claim to the *Brother Jonathan* is predicated, at least in part, on a grant of title from the *federal government* under *federal law*, there was no affront to Petitioners' sovereignty by the federal courts deciding whether that federal law — the ASA — applies to the *Brother Jonathan*. Because the ASA has important implications both for the interests of the federal government and for the admiralty jurisdiction of the federal courts, state courts cannot be left with exclusive jurisdiction to decide cases involving the application and interpretation of that federal law. For these reasons, the courts below did not err in concluding that this action is not barred by the Eleventh Amendment.

II. California Public Resources Code § 6313 is preempted by both the ASA itself and the general federal maritime law preserved by the ASA. Under § 6313, Petitioners claim title to all shipwrecks located on state lands for more than 50 years — irrespective of whether such wrecks meet the ASA requirements of being abandoned, embedded in the sea floor, or determined eligible for listing in the National Register of Historic Places. In enacting the ASA, Congress sought to exclude from federal admiralty law only a limited class of shipwrecks meeting each of the criteria set forth in the Act; however, Congress also intended that wrecks not meeting the ASA criteria continue to be governed by uniform principles of federal admiralty law, including the law of salvage. To the extent that § 6313 purports to vest Petitioners with title to shipwrecks not conveyed to the states under the ASA, it plainly conflicts with the ASA and with Congress' intent in enacting the statute. Furthermore, § 6313

also impedes the uniformity and harmony of federal maritime law preserved by the ASA. For these reasons, the lower courts correctly held that it is preempted.

III. Abandonment is a question of fact. After hearing all of the evidence, the courts below concluded that the *Brother Jonathan* is not abandoned. That factual finding is not clearly erroneous; rather, it accords with the great weight of the evidence. Contrary to Petitioners' suggestion, the lower courts did not adopt a broad "technology exception" to the rule that abandonment may be inferred from all of the circumstances. Rather, the lower courts simply recognized that an owner's ability or inability to recover lost property is one factor among many that the courts may properly consider in determining whether an inference of abandonment is appropriate.

The courts below properly rejected Petitioners' suggestion that the wreck of the *Brother Jonathan* be subdivided into abandoned and unabandoned portions, with the unabandoned portions remaining within the *in rem* jurisdiction of the federal admiralty courts and the abandoned portions being subject to disposition under state law. Such a division would likely lead to conflicting and inconsistent rulings between the state and federal courts, and would effectively preclude the management of shipwrecks in a unified, organized, and concerted fashion, contrary to Congress' purpose in enacting the ASA. Furthermore, a finding at this time that all uninsured portions of the wreck are abandoned would deprive potential claimants thereto of notice and an opportunity to be heard.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN HOLDING AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE ASA APPLIES TO THE *BROTHER JONATHAN.*

A. Because Petitioners Argued That The ASA Deprived The District Court Of Its Subject Matter Jurisdiction, It Was Incumbent Upon The District Court To Determine Whether The ASA Applies To The Brother Jonathan.

Petitioners assert that they intervened in this action "for the limited purpose of asserting the State's Eleventh Amendment Immunity." Pet. Brf. 12. That is not entirely correct. In fact, the record plainly shows that Petitioners raised two distinct arguments below:

> First, the defendant, the BROTHER JONATHAN is an abandoned shipwreck, eligible for inclusion in the National Historic Register, embedded in the subsurface of the territorial waters of the State of California, and as such the Abandoned Shipwreck Act deprives a federal court of jurisdiction to adjudicate a claim to such a ship based on the law of salvage and the law of finds. 43 U.S.C. 2106(a).
>
> Second, Plaintiff's action is a suit against the State from which it is immune under the Eleventh Amendment to the United States Constitution.

J.A. 89. In short, Petitioners not only asserted their Eleventh Amendment immunity, but they also argued that the ASA deprived the district court of its admiralty subject matter jurisdiction over the case.[8] Petitioners thus asserted a challenge to the district court's subject matter jurisdiction apart from their

8. Several courts have held that, by eliminating the substantive admiralty law of salvage and finds with respect to wrecks that meet its criteria, the ASA effectively divests the federal courts of their admiralty *in rem* jurisdiction over such wrecks. *See, e.g., Zych v. The Seabird*, 941 F.2d 525, 531 and n.9 (7th Cir. 1991).

assertion of Eleventh Amendment immunity. This challenge to the district court's subject matter jurisdiction was predicated upon the contention that the *Brother Jonathan* meets the criteria set forth in the ASA. J.A. 89. Petitioners admitted that, in order to prevail on this jurisdictional challenge, they would have to prove that the *Brother Jonathan* meets the ASA criteria. J.A. 195.

Federal courts have both the power *and the duty* to determine their own jurisdiction. *See United States v. United Mine Workers of America*, 330 U.S. 258, 291 (1947). *See also* 5a Wright & Miller, Federal Practice and Procedure (West 2d ed. 1990), § 1350, pg. 85 ("[S]ubject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power."). Where the question of subject matter jurisdiction turns upon disputed facts, the court can, and must, hear such evidence as may be necessary to decide the jurisdictional facts — even if the jurisdictional facts touch upon the merits. *Land v. Dollar*, 330 U.S. 731, 735 and n.4, and 739 (1947).

Because Petitioners' jurisdictional challenge was premised upon the ASA, and because application of the ASA turned upon disputed issues of fact — *i.e.*, whether the *Brother Jonathan* was abandoned, embedded, etc. — it was necessary for the district court to convene an evidentiary hearing to determine whether the ASA applies to the *Brother Jonathan*. The district court made clear that its limited purpose in convening the hearing and taking evidence was to determine whether the ASA applies to the *Brother Jonathan*, and thus whether the district court had jurisdiction. *See* 883 F. Supp. 1348 and n.3. Petitioners intervened in this case, asserted that the ASA applies to the *Brother Jonathan*, and claimed that the ASA divests the district court of its subject matter jurisdiction. Petitioners submitted evidence purporting to show that the *Brother Jonathan* meets the criteria set forth in the ASA. DSR submitted contrary evidence. Under these circumstances, Petitioners are in no position to complain that the district court decided the question of whether ASA applies to the *Brother Jonathan*. Indeed, Petitioners' own

jurisdictional challenge necessitated that very course. As the Ninth Circuit explained, any lesser course would have been "inconsistent with the court's duty to assess whether it has jurisdiction." 102 F.3d 386.

B. Petitioners Did Not Establish That This Is An Action "Against The State" For Purposes Of The Eleventh Amendment.

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the wording of the amendment suggests a limitation on the federal courts' subject matter jurisdiction, this Court has consistently rejected that view. Rather, the Amendment simply provides unconsenting states with a sovereign immunity defense from suit — and is not a non-waivable jurisdictional bar. *See e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2033. From the Eleventh Amendment's nature as an affirmative defense, it follows that the defendant asserting that defense has the burden of establishing whatever facts may be necessary to perfect it. That has been the holding of most of the circuits that have addressed the issue. *See, e.g., ITSI TV Productions, Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291-1292 (9th Cir., 1993); *Christy v. Penn. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995); *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 735 (7th Cir. 1994).[9]

---

9. This is in keeping with the rule applied in sovereign immunity cases, where it has been held that the defendant "must prove its entitlement to [sovereign] immunity by a preponderance of the evidence." *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987), *cert. den.*, 484 U.S. 976 (construing Foreign Sovereign Immunities Act, 28 U.S.C. § 1330); *Prescott v. United States*, 973 F.2d 696, 701-01 (9th Cir. 1992) (construing Federal Tort Claims Act, 28 U.S.C. § 1346).

What must a defendant prove in order to perfect its Eleventh Amendment defense? The answer to that question can be found in the very text of the Amendment itself: The defendant must show that the action is one "commenced or prosecuted against one of the United States."

> As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the State was a party to the record . . . has long since been abandoned, and it is now established that the question is to be determined not only by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record . . . .

Ex parte State of New York, 256 U.S. 490, 500 (1921).

However broad, the Eleventh Amendment's reach is not limitless; it does not bar all suits in federal court — only those deemed to be "against a state." Thus, the line must be drawn somewhere. In deciding where to draw that line, this Court has been guided by the twin purposes of the Eleventh Amendment: prohibiting unconsented raids on state treasuries, and protecting states from the indignity of having to respond to coercive process in federal court. *See Hess v. Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394, 400 (1994); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Also important is the competing need to ensure the availability of a forum for the vindication of important federal interests. *Coeur d'Alene*, 117 S. Ct. 2035-2037 (opinion of Justice Kennedy and Mr. Chief Justice Rehnquist) and 2045-2046 (opinion of Justices O'Connor, Scalia, and Thomas).

Applying these principles, this Court has held that a suit against a state officer may be barred by the Eleventh Amendment — even though the state itself is not named as a defendant — if the suit seeks an award of money damages payable from the state treasury, *see Edelman v. Jordan*, 415 U.S. 651 (1974), or if the suit seeks a judgment declaring that the state has no title to, or regulatory authority over, lands that historically have been uniquely associated with state sovereignty, *see Coeur d'Alene*, 117 S. Ct. 2028.

However, a suit seeking to enjoin state officers from future violations of federal law is not deemed barred, even if the injunction would have an incidental effect on the state treasury; because the state officer's actions are alleged to be in violation of law, they cannot be deemed actions of the state itself and thus there is no affront to the state's sovereignty in allowing the suit to proceed. *Ex parte Young*, 209 U.S. 123 (1908). Furthermore, the effect on the state treasury of the requested injunctive relief is no more than that which is required of the state in conforming its actions to the dictates of the supreme federal law. *Id.*

An *in rem* action against state-owned property may be barred as a suit "against a state" if the suit is simply a disguised attempt to obtain an award of money damages against the state itself, *Ex parte New York*, 256 U.S. 490, 501-503 (1921) ("*New York I*"), or if the suit seeks to dispossess the state of property that is within the state's actual possession and is being "used and employed [by the state] for public and governmental purposes," *Ex parte New York*, 256 U.S. 503 (1921) ("*New York II*"). However, the Eleventh Amendment does not bar the federal court in an *in rem* proceeding from issuing an order dispossessing state officers of the *res* that is the subject of the suit where the state officers have no colorable claim to that *res*. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

Petitioners here contend that this suit should be deemed barred by the Eleventh Amendment as an action "against the state" merely by virture of the fact that Petitioners *claim* they own the wreck. However, there is absolutely no support in this Court's decisions for that sweeping and novel proposition. In fact, the authorities are clearly to the contrary. In *United States v. Peters*, 9 U.S. 115, 139 (1809), Chief Justice Marshall, writing for the Court, rejected precisely the assertion advanced by the Petitioners here:

> [The Eleventh Amendment cannot] be so construed as to oust the court of its jurisdiction, should [a claim of ownership by the state] be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. . . . If these proceeds had been the actual property of Pennsylvania, however

> wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; *but it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.*

(Emphasis added).

2. Petitioners cite *New York I* and *New York II* for the general proposition that the Eleventh Amendment "bars actions in admiralty against a State without the State's consent." Pet. Brf. 18. However, that simply begs the question presented here, namely: Is this particular admiralty action a suit "against a State"? On that key issue, the *New York I* and *New York II* decisions provide no support for Petitioners' position. In *New York I*, the plaintiffs brought an *in rem* action against several steam tugs, seeking to recover monetary compensation for property damage allegedly caused by the tugs in an accident. The owners of the tugs intervened in the case, and asserted that the tugs were under charter to the Superintendent of Public Works of the State of New York at the time the property damage allegedly occurred, and that for this reason the Superintendent should be held to answer. The district court then issued process against the Superintendent, "citing him to appear and answer, and in case he could not be found, that the goods and chattels of the State of New York used and controlled by him should be attached." 256 U.S. 495-496. This Court held that the process against the Superintendent was barred by the Eleventh Amendment. The Court noted that, as regards the State of New York and the Superintendent, the action had no attributes of a true *in rem* proceeding, since "[a]t no time has any res belonging to the State or to [the superintendent], or in which they claim any interest, been attached or brought under the jurisdiction of the District Court." 256 U.S. 496. Thus, the Court concluded that as to the State of New York and the Superintendent, the action was really an *in personam* claim for money damages.

In *New York II*, the heirs of a man who had drowned while

working on the steam tug *Queen City* filed an *in rem* action against the tug, seeking to recover damages for the decedent's wrongful death. The attorney general of the State of New York appeared and filed a "verified suggestion" (which the plaintiffs did not dispute) that the tug "was the absolute property of the State of New York, in its possession and control, and employed in the public service of the State for governmental uses and purposes . . . Such purposes being the repair and maintenance of the Improved Erie Canal. . . ." 256 U.S. 508. For this reason, the attorney general argued, the federal court had no jurisdiction over the tug. This Court agreed, concluding that property indisputably owned by the State, and "employed for public and governmental purposes" is exempt from process *in rem*. 256 U.S. 511.

However, the instant case is clearly distinguishable from both *New York I* and *New York II*. In both of those cases, the *in rem* process was employed in an attempt to secure a money damages award against the state. Indeed, in *New York I* the Court concluded that, as regards the State of New York, the action had no features at all of an *in rem* proceeding; the Superintendent of Public Works of the State had been summoned to appear *in personam* and be held to answer in damages for his official acts as an officer of the state in chartering the tug. Although *New York II* was an *in rem* case, the *in rem* process there was utilized to secure payment of a money damages claim against the tug's owner, the State of New York. In this case, by contrast, no officers, employees, or agents of Petitioners have been summoned to appear *in personam*. Nor is DSR's *in rem* action brought to secure payment of a damages claim against Petitioners. The record is clear: DSR does not seek any award of money damages from Petitioners. Thus, one of the most important purposes of the Eleventh Amendment — protecting states against federal court money judgments that must be satisfied from their treasuries — simply has no application here.

Petitioners claim that "the only material difference between [*New York II* and this case] is that here, the State's claim is disputed, whereas there it was not[.]" Petitioners claim that this sole distinction "cannot be the basis for refusing to apply the Eleventh Amendment." Pet. Brf. 19. Petitioners are wrong on both counts,

however. First, it is simply incorrect that the disputed nature of the state's title is the only distinguishing factor between the two cases. In *New York II*, it was undisputed not only that the State of New York *owned* the tug *Queen City*, but also that the tug was in the *actual, physical possession of the State* and was being used by the State on a daily basis for the "public and governmental purposes" of operating and maintaining the State's Erie Canal. 256 U.S. 508. Thus, the *in rem* process in that case would have necessarily had the effect of dispossessing the state of property that it indisputably owned, and that the state used on a daily basis to fulfill the functions of government. For this reason, the suit implicated the second purpose of the Eleventh Amendment: Avoiding subjecting a sovereign to the indignity of coercive process. However, that is a far cry from this case. Here, it is undisputed that the Petitioners do not know where the *Brother Jonathan* is located — other than that it is somewhere within the two-mile circle of ocean identified by DSR in its court papers — have never made any effort to locate the wreck or exercise any measure of actual physical control over it, and have never even *seen* the wreck, except in videotapes provided by DSR.

3. In the related context of federal sovereign immunity, this Court has held that an *in rem* action against property of the federal government is not barred where the property is not at the time in the actual possession of the government. *See The Davis*, 77 U.S. 15 (1869). In that case, the Court explained that "proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." *Id.* at 20. The Court also explained that the possession "must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." *Id.* at 21. The same rule should apply in the Eleventh Amendment context. It is one thing to say that an *in rem* action against a tug boat that the state uses on a daily basis in operating a public canal should be deemed an action against the state itself — but quite another to say that an *in rem* action against a shipwrecked vessel that was never

employed in government service when afloat, the very location of which is unknown to the state, and which has never even been seen by the state or any of its officers, is nevertheless somehow an action "against the state" itself. Under these circumstances, proceeding with the *in rem* action will not subject Petitioners to the coercive process of the federal court, will not dispossess Petitioners of their property, or otherwise be an affront to their sovereignty.

Petitioners are also wrong when they assert that the disputed nature of their claim to the *Brother Jonathan* is irrelevant to the Eleventh Amendment analysis. Apparently, Petitioners contend that by their mere act of *asserting* a claim to the *Brother Jonathan* — even if that claim be entirely meritless — they have effectively transformed this *in rem* suit into an action "against the state." For several reasons, that cannot be the law. First, such a rule is directly contrary to this Court's holding in *United States v. Peters, supra*, where Justice Marshall explained that "it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." 9 U.S. 139. In order to effectuate the broad purposes of the Eleventh Amendment, it may be appropriate to treat an *in rem* action against property owned or possessed by the state as an action against the state itself. *But cf. Bennis v. Michigan*, 116 S. Ct. 994 (1996) (automobile used in crime is subject to *in rem* forfeiture despite fact that owner not involved in or aware of the crime). However, where the property is not by its very nature state-owned, and is not in the actual physical possession of the state or its agents, the state's mere assertion of a bald and completely unsubstantiated claim to the property should not be deemed to transform the action into one "against a state." The fundamental problem with Petitioners' approach is that it would make the Eleventh Amendment analysis turn, not upon the essential nature and character of the suit itself as brought, but upon the whim of the state in subsequently deciding whether or not it will assert a claim to the property. In this manner, virtually any suit that in any way

involves property could be transformed into an action "against the state" merely by virtue of the state's assertion of a bald and completely unsubstantiated claim to the property in question. The Eleventh Amendment does not dictate such an untoward result.

Of course, where the property is in the actual possession or use of a state, and the *in rem* action seeks an order dispossessing the state of the property, no inquiry into the state's title would be required as part of the Eleventh Amendment analysis. This is the teaching of the dissent in *Treasure Salvors*, 458 U.S. at 702-703 (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell) (noting that "a federal court may [not] adjudicate a State's right to ownership of specific property *within the possession of* a State's consent."). Because the suit seeks to subject the state to the coercive process of the federal court by dispossessing the state of property it holds, the action may be deemed barred by the Eleventh Amendment irrespective of any questions regarding the state's title. But where, as here, the property is not in the actual possession of the state,[10] is not being used by the state in the discharge of its governmental functions, and carries with it no obvious indicia of state ownership, the state's mere act of asserting a bald claim of title to the property is not enough to transform the case into an action "against the state"

---

10. Petitioners claim that they have "constructive possession" of the *Brother Jonathan*. *See* Pet. Brf. 16. However, as made clear in *The Davis, supra*, 77 U.S. 21, in order for an *in rem* action against property to be deemed "against the sovereign", the sovereign's possession "must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." Furthermore, it is simply incorrect to suggest that Petitioners have constructive possession of the *Brother Jonathan*. In order to be deemed to have constructive possession of property, at a minimum the person must have knowledge of the specific location of the property and the immediate ability to exercise physical control over that property. To say that Petitioners have constructive possession of a shipwreck that they do not know the location of, have seen only on videotape, and have never made an effort to locate or recover, would be stretching a fiction to an absurd length.

and deny the plaintiff a federal forum — leaving plaintiff with no effective remedy for the vindication of its federal rights.[11]

4. Of course, the Eleventh Amendment analysis should not be viewed by the district courts as an open invitation to probe intrusively into the minutiae of the state's title. However, that is not what occurred below. The District Judge did not reject Petitioners' plea to dismiss the case under the Eleventh Amendment because he found Petitioners' claim of title defective in some technical detail. Rather, the District Judge found that Petitioners had completely failed to make any meaningful showing on the

---

11. DSR's rights as salvor are defined exclusively by federal admiralty law. Under federal admiralty law, the salvor is entitled to compensation from the recovered *res*, and he has a lien against the *res* to secure that right. The salvor enforces the lien by way of an *in rem* action against the *res*. *See* discussion of this topic *supra* at 4-6. As explained *supra*, it has long been established that *in rem* salvage actions fall within the *exclusive* jurisdiction of the federal admiralty courts; such actions cannot be maintained in state courts. Thus, before the district court Petitioners freely conceded that DSR would have no remedy in state court if this matter is dismissed from federal court. "[T]he State has no provision for the creation of an interest or right, either ownership under finds or a possession [sic] under salvage, for activities such as plaintiff has undertaken." Intervenor, State of California's Brief on State Remedies, Docket No. 57, at 2. In a change of position, Petitioners now claim that DSR may pursue a remedy against Petitioners in the California state courts: namely, a quiet title action. However, this suggestion is illusory, at best. Although Petitioners may have waived their sovereign immunity and consented to suit in their own courts for quiet title claims, the *federal government* has not done so. Any quiet title action that in any way implicates the property rights of the federal government can proceed only in federal court and the federal government must be joined as a necessary party to the suit. *See California v. Arizona*, 440 U.S. 59, 60-65 (1979); 28 U.S.C. § 1346(f). The federal courts have exclusive jurisdiction over such suits. *Id.*

Even if such a suit could somehow be brought in state court, the state court could not afford meaningful relief to DSR. The state court would be disabled from rendering any *in rem* remedy — since such remedy is exclusively within the jurisdiction of the federal courts — and thus the state court could never award DSR clear title to the *Brother Jonathan*.

essential, threshold issues of abandonment and embeddedness. Not only are those elements required for the state's claim under the ASA, but they also have important and independent legal significance. If private property is not abandoned, the state can make *no claim* — colorable or otherwise — to the property unless it is prepared to pay just compensation as required under the Fifth Amendment. Because the District Judge found that the *Brother Jonathan* is not abandoned, he properly concluded that Petitioners could lay no claim to the property and that the action is not one "against a state." Litigation involving unabandoned private property cannot in any sense be deemed an action "against the state" for purposes of the Eleventh Amendment.

Equally important and fundamental is the issue of embeddedness. Under long-settled, elementary principles of the common law, the owner of real property does not have any rights with respect to abandoned items found on his land, as against the first finder thereof, unless the item was found embedded in the land. *See supra* at 6. That fundamental principle is preserved by the ASA. *See* 43 U.S.C. § 2105 (requiring, *inter alia*, that wreck be embedded in state submerged lands in order for title to pass to state). These are not "fine points" with respect to the state's claim of title. Absent meaningful proof that the *Brother Jonathan* is abandoned and embedded in Petitioners' submerged lands, Petitioners simply have no claim — colorable or otherwise — to the wreck.

Petitioners complain that they were "constrained to prove that [they] had a 'colorable claim' to the *Brother Jonathan*." Pet. Brf., 26. This suggests that the district court or DSR somehow *foisted* the "colorable claim" standard upon Petitioners, and *compelled* them to produce evidence in support of that claim. Nothing could be further from the truth. As the record clearly reflects, it was *Petitioners* who argued below that the "colorable claim" standard was the appropriate test for assessing their motion to dismiss. J.A. 199, 225, 278-279. Furthermore, Petitioners elected to present evidence — including affidavits, requests for judicial notice, and even live witness testimony — in an attempt to establish the "colorability" of their claim. No one compelled Petitioners to produce that evidence. However, the district court found Petitioners'

evidence in this regard completely lacking in probative value, and that the evidence produced by DSR clearly established that the *Brother Jonathan* is not abandoned, not embedded in the sea floor, and had not been determined eligible for listing in the National Register of Historic Places. 883 F. Supp. 1351-1357. Thus, the district court concluded that Petitioners had not shown a "colorable claim" to the wreck. *Id.* Only then did Petitioners renounce the colorable claim standard and complain that they had somehow been "constrained" to present evidence of a colorable claim.

5. Petitioners cite to this Court's decision last term in *Coeur d'Alene*, 117 S. Ct. 2028, as supposed authority for their position. However, that case is clearly distinguishable. In *Coeur d'Alene*, an Indian tribe brought an *in personam* suit in federal court, naming the State of Idaho by name as a defendant, as well as the governor and various other senior state officials. *Id.* at 2032. In the suit, the Tribe asserted that it owns the lands submerged beneath Lake Coeur d'Alene, and sought to quiet title to those lands as against the State of Idaho. *Id.* Although the Tribe claimed title to the Lake by virtue of an early treaty, the State of Idaho had been managing and regulating the lake and its uses for many years. Indeed, the State had even adopted a number of statutes and regulations specifically addressing Lake Coeur d'Alene by name, declaring the State to be the owner of the lake, and regulating the uses thereof. *Id.* at 2042-2043. In addition to its quiet title claim, the Tribe also prayed for a declaratory judgment declaring that the Tribe has the sole right to use and occupy the lake, declaring that all Idaho state statutes or regulations pertaining to the lake are invalid, and enjoining the state from enforcing any such statutes or regulations. *Id.* at 2032.

The State of Idaho was subsequently dismissed from the suit, on the ground that the claims against the State itself are barred by the Eleventh Amendment. The question then arose whether the case should be allowed to proceed as to the state officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) — despite the fact that the Tribe sought essentially the same relief against the officials as it had sought as against the State itself. This Court held that those claims, too, are barred by the Eleventh Amendment. The Court noted the claims against the State officials should not be deemed

to fit within the *Ex parte Young* doctrine, because those claims were the "functional equivalent" of a quiet title action against the State itself. *Id.* at 2040. The Court also emphasized that the property at issue in the suit — lands beneath inland navigable waters — has long been considered uniquely associated with state sovereignty, title thereto having been granted to the states by the Constitution itself, under the "equal footing" doctrine. *Id.* at 2041. Thus, the Tribe's suit uniquely implicated Idaho's sovereign interests.

Coeur d'Alene is distinguishable from this case in a number of very important respects. First, and perhaps foremost, *Coeur d'Alene* began as an *in personam* suit against the State of Idaho itself, and numerous senior officials of that State, including the governor. The issue thus posed was whether, following dismissal of the state itself, the plaintiff should be permitted to invoke the *Ex parte Young* fiction in order to pursue sweeping injunctive relief which, although nominally aimed at state officials, would necessarily divest the state with all rights of ownership *and regulatory authority* over the land. Here, by contrast, the complaint names neither the State of California nor any of its officers, agents, or employees, and seeks no *in personam* injunctive relief against any of them. Although an injunction has been issued by the district court, it enjoins only "competing salvors," who are prohibited from conducting diving or salvage activities at the wreck site. J.A. 300. In a subsequent order, the district court made clear that state government authorities acting in the course of their official duties are not subject to the injunction and are not excluded from the wreck site. *See* Order Re. Motion To Amend Injunction, at Docket No. 115. No injunction is sought precluding the State from exercising its regulatory authority over its submerged lands. To the contrary, the district court in the proceedings below specifically declined to foreclose any role of state regulatory authority over the manner in which the wreck is recovered from Petitioners' submerged lands. J.A. 217. However, the mere fact that a state may have a regulatory interest in the subject matter of the suit is not sufficient to render the action barred by the Eleventh Amendment as an action "against the state."

Furthermore, the lead opinion in *Coeur d'Alene* emphasizes that the Tribe could have brought the very same claims, and pursued the same relief, in state court that it sought in the federal forum. 117 S. Ct. 2032, 2038. That is certainly not true here. As explained *supra* at n.11, the state courts are not available for the litigation of DSR's claims. Thus, if this action is dismissed DSR will be left with no forum whatsoever for the vindication of its federal rights.

Finally, as emphasized by this Court in *Coeur d'Alene*, the property at issue there — lands submerged under inland navigable waters — is uniquely associated with state sovereign interests, having been conveyed to the states by the Constitution itself, under the equal footing doctrine. However, the property that is the subject of this dispute is not state lands themselves — but rather a shipwrecked vessel that was owned by a private company, never employed in the service of the state, and only by chance came to rest on Petitioner's submerged lands. Shipwrecks — unlike lands submerged under inland waters — have never been recognized in American law as a "sovereign perogative." *United States v. Tyndale*, 116 F. 820, 822-823 (1st Cir. 1902); *British Consul v. Twenty-Two Pipes, etc.*, 4 F. Cas. 173, 174 (D.S.C. 1801); *Fisher v. The Sybil*, 9 F. Cas. 141, 141 (C.C.D. S.C. 1816), *aff'd*, 4 Wheat (17 U.S.) 98. Thus, this suit does not implicate unique sovereign interests in the manner of *Coeur d'Alene*.

6. Furthermore, even if this suit could somehow be construed as involving Petitioners' control of their *offshore* submerged lands, such lands — unlike the lands under *inland* submerged waters at issue in *Coeur d'Alene* — are not uniquely associated with state sovereignty. Indeed, as was made clear in *United States v. California*, 332 U.S. 19 (1947), the *federal government* is the paramount sovereign with respect to submerged lands seaward of low-water line. *See id.* at 33-36.

As this Court is well aware, in the aftermath of *United States v. California*, Congress did allocate certain aspects of control offshore to the states in the Submerged Lands Act (SLA), 67 Stat. 29 (1953), 43 U.S.C. § 1311. However, the SLA conveys to the states only the *natural resources* on the lands in question; it does not convey any rights to man-made objects such as shipwrecks. 43

U.S.C. §§ 1311(a) & 1314(a); *Treasure Salvors*, 569 F.2d 330. Further, the SLA specifically withholds from the states all " rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation," and retains in the federal government "all its . . . powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defence, and international affairs." 43 U.S.C. §§ 1311(d) & 1314(a). This reservation of federal interests has been construed to apply to the disposition of historic shipwrecks. *See Treasure Salvors*, 569 F.2d 330; *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981).

The states thus sought legislation from the federal government granting them title to, and regulatory authority over, such wrecks. This legislation was the ASA. *See* H.R. Rep. No. 100-514, (II) at 2-3 *reprinted in* 1988 U.S.C.C.A.N. at 371. Thus, it is no surprise — and certainly no mere accident — that the ASA initially declares the *federal government* the owner of all shipwrecks meeting the ASA criteria. 43 U.S.C. § 2105(a). The states receive title only through conveyance from the federal government. 43 U.S.C. § 2105(c). Although under the ASA the federal government conveys title to the states immediately, nevertheless the fact that the initial claim of title is in the name of the federal government carries great conceptual — if not temporal — significance. This is so for several reasons. First, because the federal government is the paramount sovereign with respect to offshore lands — and there is no "shipwreck" analogue to the equal footing doctrine — it was essential that the ASA be structured as an exercise of federal sovereign prerogative. Thus, the district court's adjudication of whether the *Brother Jonathan* meets the ASA criteria did not implicate Petitioners' "unique sovereignty interests." Petitioners' rights to the *Brother Jonathan* are no more and no less than what Congress has granted in the ASA. Because Petitioners' rights, if any, to the *Brother Jonathan* under the ASA derive from the federal government, it was certainly no affront to Petitioners' sovereignty that a federal court decided whether the *Brother Jonathan* meets the ASA criteria.

7. The approach advocated by Petitioners would effectively mean that decisions regarding the interpretation and application of the ASA — a federal law — would be vested exclusively in the state courts. Of course, state courts are generally competant to apply federal law. However, application of the ASA carries with it several important consequences for the federal government and its interests apart from the interests of the states. Where it applies, the ASA displaces the traditional federal admiralty laws of salvage and finds. *See* 43 U.S.C. § 2106(a). As explained *supra*, the ASA also divests the federal courts of their subject matter jurisdiction over cases involving shipwrecks that meet the ASA criteria. *See supra* at 7. If Petitioners' position is accepted, the result will be that state courts will have exclusive jurisdiction to decide these important federal interests. Had Congress intended such an anomalous result in enacting the ASA, it surely would have made that intention manifest. Because the ASA is silent on the question of which court — state or federal — is to decide whether any given shipwreck meets the ASA criteria, and because that determination affects important federal interests, it must be presumed that Congress intended for that determination to be made by the federal courts — not in abrogation of the states' Eleventh Amendment rights, but simply as an implicit but necessary condition upon the states' taking of title to shipwrecks from the federal government under a federal law, the ASA. Thus, the other important factor in the Eleventh Amendment analysis — the importance of providing a federal forum for the adjudication of important federal interests — points strongly against application of the Eleventh Amendment here.

For each of these reasons, the courts below did not err in concluding that this action is not barred by the Eleventh Amendment.

II. FEDERAL LAW PREEMPTS PETITIONERS' STATUTORY CLAIM OF TITLE TO SHIPWRECKS EXPRESSLY EXCLUDED FROM THE ASA.

Petitioners admit that their claim of title claim to shipwrecks under state law "is broader than the ASA[.]" Pet. Brf. 38. As acknowledged by the Amici States, "the legislative scope of the

ASA is quite narrow." Brief For Amici States Of Florida, *et al.* at 24. The ASA grants States title only to abandoned shipwrecks within the three-mile territorial sea that are either "embedded" in the sea floor or listed in the National Register of Historic Places. 43 U.S.C. §§ 2105(a)-(c). Through California Public Resources Code § 6313(a), however, "California claims title to *all* abandoned shipwrecks on its sovereign submerged lands, *not* just those that are embedded or historically significant." Pet. Brf. 38 (emphasis added). California law requires the State to prove only that a shipwreck is located in state waters and more than fifty years old. California Public Resources Code § 6313(b)-(c).

The courts below correctly held that federal maritime law, as specifically preserved by the ASA, preempts Petitioners' claim to the extent it exceeds the ASA's limited grant of title. 883 F. Supp. 1357-1359, *aff'd*, 102 F.3d 379, 384 (9th Cir. 1996). Petitioners' claim flies in the face of the supremacy of federal maritime law, both statutory and judge-made, guaranteed by the Constitution.

A. Preemption Doctrine Under Federal Maritime Law.

Petitioners concede that *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and its progeny establish the "basic preemption framework in admiralty law." Pet. Brf. 45. Under *Jensen*, state law must give way if it "contravenes the essential purpose *expressed by an act of Congress*, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. 216 (emphasis added); *accord American Dredging*, 510 U.S. 447; 1 *Benedict On Admiralty*, Jurisdiction § 112 at 7-36 (7th rev. ed. 1994) ("states may modify or supplement federal maritime law but . . . they may not flatly contradict it or deprive any person of a substantial federal right."); 14 Wright Miller & Cooper, *Federal Practice and Procedure* Admiralty § 3672 at 443-444 (2d ed. 1985) (same). Non-maritime precedent likewise recognizes that preemption may be express, or implied from context or required when federal law and state law actually conflict. *E.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

The paramountcy and preemptive effect of federal maritime law are at their height in matters off-shore. Even after the enactment of the Submerged Lands Act and the ASA, it is beyond question that "the United States has paramount sovereign authority over submerged lands beneath the territorial sea." *United States v. State of Alaska*, 117 S. Ct. 1888, 1906 (1997) Federal legislation granting rights to states over submerged lands in the off-shore territorial sea "is a grant of federal property, and the scope of that grant must be construed strictly in the United States' favor." *Id.*

B. The ASA Quitclaims Only A Limited Class Of Shipwrecks To The States And It Would Contravene Congressional Intent To Permit States To Claim Title To Other Shipwrecks On Submerged Lands Over Which The United States Has Paramount Sovereign Authority.

The ASA provides that "[t]his Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies." 43 U.S.C. § 2106(b). The House Committee on Interior and Insular Affairs underscored that it was Congress'

> inten[t] to carve out a *limited* exception from general admiralty principles for those classes of shipwrecks to which this Act applies. *All other shipwrecks . . . remain subject to the uniform principles of admiralty law*, except as may be provided in other *federal* law.

H.R. Rep. 100-514(II) at 8, *reprinted in* 1988 U.S.C.C.A.N. at 377 (emphasis added). Congress did not say, as Petitioners might wish, that state law also would apply to non-ASA shipwrecks. As noted above, legislation such as the ASA which grants rights to States on submerged lands beneath the territorial sea must be strictly construed in favor of the United States and against the States. *United States v. State of Alaska*, 117 S. Ct. 1906. By mandating the "uniform" application of general admiralty law to non-ASA shipwrecks except as otherwise provided by "federal law," Congress thereby excluded them from "the 'twilight zone' where state regulation was permissible." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 344 (1973).

In enacting the ASA, Congress sought to resolve definitively, and in a nationally uniform way, the considerable uncertainty and inconsistency that had existed with regard to title to abandoned shipwrecks. *See* H.R. Rep. 100-514(I) at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366 ("There is currently confusion over the ownership and authority to manage abandoned shipwrecks . . . Twenty-seven states have passed legislation concerning historic shipwrecks. Recent court cases have put in question the validity of these various laws."). The ASA accomplishes that purpose: (1) by specifically and narrowly defining a class of shipwrecks; (2) by declaring that the federal government shall have title to shipwrecks falling within that class; and (3) by subsequently transferring title to the States in whose waters the wrecks are located. The States are not free to tamper with the balancing of interests and limited title transfer crafted by Congress through the ASA.

C. California Public Resources Code § 6313 Plainly Conflicts with the ASA.

The courts below correctly held that the ASA preempts the broader reach of § 6313, in that it frustrates Congress' explicit goal of a nationally uniform disposition of title to abandoned shipwrecks, and upsets the delicate congressional balance of competing interests in defining the specific, limited class of shipwrecks conveyed to the States. As made clear by the legislative history cited above, Congress enacted the ASA precisely for the purpose of eliminating the confusion and uncertainty created by a maze of conflicting state legislation regarding shipwrecks.

Section 6313 not only frustrates Congress' purpose in enacting the ASA, but also plainly conflicts with the ASA in other important respects. First, the ASA rests upon the premise that the *federal government* has title to shipwrecks meeting the criteria spelled out in the Act. *See* 43 U.S.C. § 2105(a). States obtain title to such shipwrecks only by grant from the federal government. *See* 43 U.S.C. § 2105(c). Section 6313 contradicts the ASA, in that it purports to vest California with title to shipwrecks by state legislative fiat.

Section 6313 also conflicts with the ASA to the extent that it

purports to vest the State with title to shipwrecks that do not meet ASA criteria. As indicated above, the ASA provides that federal maritime law, not state law, will continue to govern title questions concerning non-ASA shipwrecks. Congress has spoken on the question of the class of shipwrecks to which States may legitimately claim title, and California has defied the congressional directive.

Some state regulation of certain offshore activities is permissible in the face of congressional silence. *See Skiriotes v. Florida*, 313 U.S. 69 (1941) (sponge diving); *Alaska v. Arctic Maid*, 366 U.S. 1991 (1961) (taxation); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973) (pollution regulation). These cases are inapposite here, where Congress has specifically limited the shipwrecks to be quitclaimed to the States, and has left the remainder subject to plenary and unencumbered federal control.

D. The General Federal Maritime Law Specifically Preserved By The ASA Also Preempts California Public Resources Code § 6313.

As previously noted, the *Jensen* decision confirmed that, even "in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction." *Jensen*, 244 U.S. 215. State law therefore is preempted if it "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law[.]" *Id.* at 216. While *Jensen* also recognized the preemptive force of express federal statutory directives, *Jensen* focused on preserving paramount federal power by preempting state legislation at variance with judge-made general maritime law. *Id.* at 215-216.

This Court clarified the central purposes of federal supremacy in the maritime field and reaffirmed *Jensen*'s continuing vitality in *American Dredging*, 114 S. Ct. 981. *American Dredging* held that a rule of the federal general maritime law preempts contrary state law if: (1) the rule (a) originates in admiralty *or* (b) has exclusive application there; *or* (2) the rule is of such a substantive, conduct-influencing or outcome-determinative nature that contrary state

legislation would upset the proper harmony of federal maritime law. *Id.* at 985.

The substantive law of salvage clearly satisfies this test. Since at least 1841, salvage law has been a unique and integral part of federal admiralty law. *Houseman*, 40 U.S. (15 Pet.) 40, 48. It has no counterpart outside of admiralty. The specific principle of maritime salvage law at issue here — the rule that only the United States, as paramount sovereign, may exercise sovereign prerogative over shipwrecks — originates in admiralty and applies exclusively there.

Petitioners breezily assert that they do not offend uniformity by enacting their own state law, which fundamentally changes the federal law of salvage specifically protected by Congress in the ASA. This cannot be true. Salvage is a fundamental part of federal admiralty law. Its uniform application is necessary to maintain the proper harmony of the maritime law. Most importantly of all, Congress already has specifically rejected the states' independent claims. Petitioners' reassertion of their own law as a purported jurisdictional basis for Eleventh Amendment immunity intolerably challenges both congressional supremacy in federal maritime legislation and the jurisdiction of federal admiralty courts.

For each of these reasons, the lower courts correctly concluded that § 6313 is preempted to the extent that it purports to vest Petitioners with title to a class of shipwrecks broader than that conveyed by the ASA. In the event the Court determines that the ASA has no such preemptive effect, it should remand to the lower courts with instructions to consider the ASA's constitutionality under the Admiralty Clause.[12]

---

12. The district court cautioned that if § 6313 is not preempted, "The validity of the California law could provide strong evidence that the ASA destroys the uniformity of admiralty and maritime law," contrary to the Admiralty Clause. 883 F. Supp. at 1359.

III. THE COURTS BELOW DID NOT CLEARLY ERR IN THEIR CONCLUSION THAT THERE WAS INSUFFICIENT PROOF SHOWING THE *BROTHER JONATHAN* IS ABANDONED

A. Title to a shipwrecked vessel does not pass to the government under the ASA unless — among other things — the vessel has been "abandoned." 43 U.S.C. § 2105(a). The abandonment requirement is an important, indeed *essential*, feature of the ASA — for without it, the Act would result in an uncompensated "taking" of property prohibited under the Fifth Amendment.

Although the ASA itself does not define abandonment, the term is familiar to the law. The essence of abandonment is the *voluntary relinquishment* of all rights in property. *See, e.g., Zych v. The Lady Elgin*, 755 F. Supp. 213, 214 (N.D. Ill. 1990); Black's Law Dictionary (abrgd. 5th ed. 1983), at pg. 1. Traditionally, abandonment has been understood to include two essential elements: a voluntary act, such as the willing surrender of possession, together with an intention to permanently relinquish ownership. *Zych*, 755 F. Supp. 214; Black's Law Dictionary, at 1.

Because abandonment is a voluntary relinquishment of property rights, a finding of abandonment is particularly problematic in instances where, as here, the owner was unwillingly — indeed *forcibly* — dispossessed of the property. The owners of the *Brother Jonathan* did not choose to jettison the ship and its cargo to the bottom of the sea; rather, it was violently wrested from them against their will, by force of the elements. Thus, it has long been the rule in admiralty that if property is lost at sea and later recovered and brought into the jurisdiction of the admiralty court, and thereafter the original owner promptly comes forward to claim it, the property will be deemed not to have been abandoned in the absence of evidence indicating that the owner intended to relinquish ownership. *See, e.g., The Akaba*, 54 F. 197, 200 (4th Cir. 1893); *Wilkie v. 250 Boxes of Sugar*, 29 F. Cas. 1247 (D.S.C. 1796) (No. 17,662). It will not be presumed that the appearing owner abandoned the property during the time of its loss; rather, abandonment must be affirmatively shown by evidence that the owner intended to

relinquished title. Such intent may be shown either by direct evidence — such as the owner's express renunciation of title — or by inference from all of the surrounding circumstances, such as the passage of time and the owner's failure to make any effort to recover the vessel. *See, e.g., Treasure Salvors*, 569 F.2d 337; *The Captain Lawrence*, 105 F.3d 1085; *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex, 1981); Schoenbaum, Admiralty And Maritime Law, § 15-7 (1987); 70 Am. Jur. 2d, Shipping, § 974 (1994).

By contrast, if the recovered property is brought into the jurisdiction of the admiralty court and, after reasonable notice[13], the original owner fails to appear and assert a claim, the property will be deemed abandoned without any further proof on the issue. *See, e.g., The Harrison*, 14 U.S. (1 Wheat) 298, 299 (1816), where Justice Story explained:

> [Where] no claim is interposed, the court[s] do not proceed to a final decree but the cause is postponed, with a view to enable any person, have title, to assert it, within a reasonable time, before the court. . . . and if no claim be interposed within that period, the property is deemed to be abandoned.

See also Russell v. Forty Bales of Cotton, 21 F. Cas. 42, 46 (S.D. Fla. 1872) (property deemed abandoned "in the absence of a claimant"); *Treasure Salvors*, 569 F.2d 337 (salvage action involving Spanish galleon wrecked in 1622; no claimant appears asserting original title; court treats vessel as abandoned and applies law of finds); *Commonwealth v. Maritime Underwater*

---

13. In a similar vein, the ASA requires that the states give public notice with regard to all shipwrecks to which they claim title under the Act. *See* 43 U.S.C. § 2105(b). No such notice has ever been given with regard to the *Brother Jonathan*. Had such notice been given, and had no claimants come forward in response thereto, then perhaps a presumption of abandonment might be appropriate. However, to permit a presumption of abandonment in the absence of such notice would not only be contrary to the terms of the ASA, but would also contravene essential procedural due process limits on government's power to acquire property by *bona vacantia*. *See* discussion of this issue *infra* at n.17.

Surveys, Inc., 531 N.E. 2d 549, 552 (Mass. 1988) (pirate ship wrecked in 17th century; no claimant appears asserting original title; court treats vessel as abandoned).

However, the rule that a wreck brought within the jurisdiction of the admiralty court may be deemed abandoned where no one appears asserting original ownership does not apply here. Original ownership claimants *did* appear here: namely, the insurance underwriters (through DSR), and the federal government. The underwriters affirmed that they paid claims for loss of the vessel, took title thereto by subrogation, did not abandon their title, and conveyed that title to DSR.[14] There is no contrary evidence in the record. The United States, as well, filed a "Claim of Owner" in which it affirmed *under penalty of perjury* that it is the "true and bona fide sole owner" of various "goods and cargo" aboard the wreck, and that it has "never abandoned" such property.[15] Furthermore, as the district court noted in its ruling, the time for claimants to intervene has not yet elapsed — leaving open the possibility that additional parties may yet come forward with proof of continuing ownership interests in the wreck or its cargo. 883 F. Supp. 1354. Thus, the admiralty rule permitting a finding of abandonment in the absence of specific evidence if no one appears and claims ownership simply does not apply here.

14. *See* J.A. 148. According to well-established precedent, a marine insurer which declares a total loss of the insured property and pays the full policy limits takes title of the property via subrogation. This can be accomplished through a formal tender of abandonment or by simply paying the full claims. *See Great Western Ins. Co. v. Fogarty*, 86 U.S. 640 (1873); *Patapso Ins. Co. v. Southgate*, 30 U.S. (5 Pet.) 604, 622-23 (1831); *Columbus-America Discovery Group*, 974 F.2d 456 ("Under applicable law, then and now, once the underwriters paid the claims made upon them by the owners of the gold, the treasure became theirs."); *The TASHMOO*, 1937 A.M.C. 1536, 1539 (Arb. 1937) ("an underwriter who has fully reimbursed his insured in respect to a loss is entitled to any salvage that results in respect to such loss. . . .").

15. J.A. 305-307. Interestingly, the United States has adopted a contrary position in this Court, arguing that the wreck is abandoned and that the district court erred in concluding otherwise. *See* Brief of United States, at pgs. 33, *et seq.*

B. Petitioners and their amici suggest that for purposes of the ASA "abandonment" should be defined more broadly than under traditional admiralty law. Specifically, Petitioners suggest that under the ASA abandonment should be "presumed." *See* Pet. Brf., 36. However, there is absolutely no support for that contention, either in the language of the ASA itself or in its legislative history. As Petitioners note, the "Congressional findings" section of the ASA suggests that "abandoned shipwrecks" are those "which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). However, this is completely consistent with the traditional admiralty rule of abandonment, as set forth *supra*, and certainly does not indicate a congressional intent to depart therefrom. Although, as Petitioners note, the legislative history indicates Congress' understanding that abandonment may be *inferred* from all relevant facts and circumstances (*see* H.R. Rep. No. 514 (I), at 2, *reprinted in* U.S.C.C.A.N. at 366), this too is in keeping with the traditional admiralty rule. However, there is nothing in the legislative history suggesting that Congress intended for abandonment to be *presumed*.[16] Because "abandonment" has a distinct definition in admiralty law, and because Congress used that term in the ASA without providing for a different definition, the admiralty definition should be deemed controlling. Had Congress intended to create a presumpton of abandonment, it could have made that intention plain in the language of the ASA. However,

16. At times, Petitioners seem to use the terms "inference" and "presumption" interchangably. *See* Pet. Brf., at, *e.g.*, pg. 33. In fact, however, the two terms have very different meanings. An inference is simply a permissible factual conclusion that the finder of fact may reach, in its discretion, from the evidence presented. Calif. Evid. Code § 600(b); Black's Law Dictionary (abrgd. 5th ed., 1983), pg. 398. By contrast, a presumption is an assumption of fact *mandated* by the law without the necessity of any evidentiary proof of the fact. Calif. Evid. Code § 600(a); Black's Law Dictionary, 617. Although it is settled that in the absence of direct evidence of the owner's intent abandonment may be inferred from all of the facts and circumstances, there is absolutely no authority — in the ASA or elsewhere — for the very different proposition that particular facts give rise to a *presumption* of abandonment against an owner who appears and asserts a claim to the wreck.

it did not do so — and perhaps for good reason. Such a presumption would essentially compel the escheat of private property and effect a compensable taking.[17]

C. Although Petitioners, their amici, and the United States attempt to characterize their disagreement with the courts below as a disagreement over the proper *legal standard* of abandonment, in truth their complaint reduces to nothing more than an argument that the district court reached the wrong *factual finding* on the evidence presented to it. However, this Court has given particular

17. Government cannot simply declare property abandoned, have it escheat (or, in the case of personalty, *bona vacantia*) to the state, and thus divest owners of title and deflect claims of unconstitutional takings of property. *See Delaware v. New York*, 507 U.S. 490, 497 n.9 (1993). This Court has made clear in its rulings that there are due process limits on the power of escheat. At a bare minimum, the state can declare property abandoned and take title only "after actual notice to all known claimants, and notice by publication to all other persons." *Hamilton v. Brown*, 161 U.S. 256, 275-76 (1896). This jurisprudence was extended in this Court's more recent ruling in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), where at issue was an Indiana statute which automatically reverted mineral rights to surface rights owners if no claim was made within 20 years. This Court held that the operation of the statute triggered procedural due process considerations, including notice and the opportunity to be heard. *Id.* at 535. In enacting the ASA, Congress expressed a concern that adequate notice be extended to possible owners of shipwrecks deemed abandoned and thus included within the class of wrecks to which the United States took title and quitclaimed to the states. *See* 43 U.S.C. § 2105(b). No such notice has ever been given with regard to the *Brother Jonathan*. To accept California's argument as posited would undermine this essential procedural due process limit on government's power to acquire property by *bona vacantia*.

Furthermore, adopting the lax standard of abandonment advocated by Petitioners and the United States would effect a taking compensable under the Just Compensation Clause. This is not a circumstance "where it is the owner's *failure* to make any use of the property — and not the action of the State — that causes the lapse of property right[.]" *Short*, 454 U.S. 531 (emphasis added). If the state presumes abandonment simply by a lapse of time, even in cases where the owner involuntarily lost property and never had an opportunity to recover it, then the result will be the taking of property.

deference to the factual findings of district courts sitting in admiralty. *See, e.g., Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206, 211 (1963); *Guzman v. Pichirilo*, 369 U.S. 698, 702 (1962).

Moreover, the district court's findings of fact, affirmed by the Ninth Circuit, were manifestly in accord with the weight of the evidence. Petitioners presented only a single item of evidence on the question of abandonment: The testimony of historian Rand Herbert. Mr. Herbert testified that he began his research on the *Brother Jonathan* only one week before the hearing, and that his research consisted solely of several hours spent in the library. *See* J.A. 245-246. At one of those libraries, the entire collection of materials on California history was being moved and was inaccessible to him, which he described as a "severe impediment" to his brief research effort. *Id.* at 230. He admitted that he did not know whether or not the original owners of the *Brother Jonathan* had undertaken any efforts to search for or recover the wreck. *Id.* at 247-248. However, his research did indicate that a number of efforts were made — by whom he cannot say — to recover the wreck. *Id.* at 248. He found no evidence that the original owners had disclaimed their interests in the wreck. *Id.* at 246. He testified that he made no effort whatsoever to research the insurance companies that insured the wreck or to contact those companies. *Id.* at 250. He does not know whether the insurance companies ever attempted to recover the wreck. *Id.*

For its part, DSR submitted a copy of a contract it entered into with two of the insurance companies that paid claims for loss of the vessel and took title thereto by subrogation. In that contract, the insurance companies represented that they had paid claims for loss of the *Brother Jonathan*, that they took title to the wreck by subrogation, that they had never abandoned their title, and that they were conveying that title to DSR. *See* J.A. 148, *et seq.* DSR also submitted two uncontroverted expert declarations describing in detail the significant advances in diving and sonar technology that have occurred within the last several years, and opining that without those advances it would have been extremely difficult — if not impossible — to locate and recover the *Brother Jonathan*. J.A. 163-169.

After carefully examining all of the evidence presented to it on the motion to dismiss, the district court concluded that the evidence did not warrant an inference that the *Brother Jonathan* is abandoned. 883 F. Supp. 1351-1354. The Ninth Circuit affirmed that factual finding. 102 F.3d 387-389.

D. Petitioners and the United States suggest that the courts below created a *per se* "technology exception" to the rule that abandonment may be inferred from all of the circumstances. They claim that under the approach adopted below, abandonment may never be inferred as to vessels that sank in deep water before the advent of modern technology. That argument is nothing more than a straw man. In fact, the lower courts did not endorse any broad *per se* "technology exception." Rather, they simply recognized that the absence of available recovery technology during a particular time period is one of the factors a court may consider in determining whether abandonment should be inferred — insofar as it relates to the reasonableness of the owner's failure to recover the wreck sooner. 883 F. Supp. 1353; 102 F.3d 388. The lower courts did not clearly err in considering this factor, among others, in determining whether to infer that the *Brother Jonathan* has been abandoned. Consideration of that factor will not forever forestall a finding of abandonment, as erroneously suggested by the federal government. As explained *supra*, where an original owner fails to appear — either in response to an *in rem* admiralty action, or in response to the public notice required under the ASA (43 U.S.C. § 2105(b)) — a finding of abandonment is warranted irrespective of other evidence on the abandonment issue. With truly antiquated wrecks, it is most likely that no owner will appear. The failure of an owner to appear, after proper notice, is the best evidence of abandonment, justifying an inference of abandonment irrespective of other factors such as the state of technology. But where an owner appears, his ability or inability to recover the wreck is certainly relevant to the abandonment analysis and the district courts should not be precluded from considering such evidence in their discretion.

E. Petitioners and the United States argue that only a portion of the wreck was insured, and that for this reason the lower courts erred in deeming the entire wreck unabandoned. They argue that

the lower courts should have segregated the wreck into abandoned and unabandoned portions. For several reasons, that argument is clearly wrong. First, the period for additional parties to intervene and assert claims to *The Brother Jonathan* or her cargo has not yet closed. Under the district court's Order, notices continue to be published in order to ensure (as with any properly instituted *in rem* proceeding) that all possible claimants are informed. Therefore, as the district court explained in its decision, it is premature to determine, on a motion to dismiss, and before the required public notice to potential claimants, what portions of the wreck are or are not the subject of ownership claims. 883 F. Supp. 1354. To hold otherwise would have been to deny potential claimants any opportunity to prove a non-abandoned interest in the wreck, without notice or any opportunity to be heard.

Furthermore, Petitioners are simply wrong in suggesting that only a *de minimis* portion of the wreck is under claim of ownership. The lower courts found that an appreciable part of the cargo — over one-third, according to findings made by the district court, 883 F. Supp. 1347 — is currently under claim of ownership by two parties: (1) DSR, through its subrogation rights from Commercial Union and Home Insurance Companies; and (2) the United States by virtue of its direct ownership claim. This justifies a finding that the wreck as a whole is not abandoned.[18]

An additional flaw in Petitioners' argument is that, to the extent that it concedes that the terms of the ASA establish the basis of the State's claim of title to *The Brother Jonathan*, Petitioners must prove *both* that the wreck is abandoned *and* embedded. The district court specifically found that the wreck is not embedded in California's submerged lands. 883 F. Supp. 1354-56. This finding was not disturbed on appeal. Therefore, even if part of the wreck is deemed abandoned, Petitioners still have no claim under the ASA.

18. The Ninth Circuit did, however, properly reserve the question of "whether there is some point at which the portion of the wreck that is insured becomes so negligible that the wreck might be considered abandoned for the purposes of the ASA." 102 F.3d 389. That point, as held by both courts below, has not been reached on the facts presented here. A substantial part of the cargo of *The Brother Jonathan* is under claim here by two parties.

Finally, the Ninth Circuit properly held that to divide a shipwreck into abandoned and nonabandoned portions is "inconsistent with the general rule of maritime law of treating wrecks as a legally unified *res*." 102 F.3d 388. The entire point of an *in rem* proceeding is to determine, with efficiency and finality, the rights and interests of all claimants to the *res*. *See The MARY*, 13 U.S. (9 Cranch) 126, 142-43 (1815); *Rounds v. Cloveport Foundry & Machine Co.*, 237 U.S. 303, 306 (1915); *see also* Supplemental Admiralty Rule C(4) & advisory committee note. To follow California's approach would be to invite duplicative and likely conflicting proceedings: one in state court (for that part of the wreck which is abandoned) and one in federal court (for that part which is unabandoned). The result would preclude any unified, coherent approach for managing the wreck as a whole. Congress could not have intended this result, nor would judicial efficiency sanction such two-track litigation, especially with the attendant collateral estoppel and abstention consequences.

CONCLUSION

For each of the foregoing reasons, Respondent Deep Sea Research, Inc. respectfully prays that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

STUART M. GORDON
FLETCHER C. ALFORD*
DAVID COLLINS
GORDON & REES, LLP
Attorneys for Respondent
20th Floor
Embarcadero Center West
275 Battery Street
San Francisco, CA 94111
(415) 986-5900

Of Counsel:

DAVID J. BEDERMAN
SCOTT D. QUESENBERRY
Gambrell Hall
Atlanta, GA 30322-2770
(404) 727-6822

* *Counsel of Record*

APPENDIX A — REPORT ON SALVAGE OPERATIONS ON THE *BROTHER JONATHAN* OBSERVED BETWEEN AUGUST 22-25, 1997

REPORT
OF SALVAGE OPERATIONS ON THE
BROTHER JONATHAN
OBSERVED BETWEEN AUGUST 22-25, 1997

Prepared on August 30, 1997 by
Gary Gentile, Expert Witness for the Court

I spent three days and one night aboard the vessel *American Salvor* and one day ashore, observing various phases of the operation, interviewing participants, and visiting land-based sites. I obtained a broad perspective and overview of Deep Sea Research's activities with respect to the salvage of treasure, the treatment of non-treasure artifacts, the conduct of operations, and the philosophies of the principal personnel.

The *American Salvor is* more than 200 feet in length, with bunks and facilities aboard to feed and support twenty-five people (according to Coast Guard regulations). She served as the platform for all salvage operations. The primary function of the *American Salvor is* to salvage stranded vessels and to support diving operations when necessary. She is owned and operated by Crowley Marine Services. The vessel was held in place over the wreck by a four-point moor.

As soon as I came aboard, James Wadsley took me on a complete tour of the vessel. He introduced me to the people at their work stations, and explained every phase of the operation: ship handling, saturation set-up, bell and chamber mating system, umbilical hoses, recovery methods, artifact disposition, and so on. The vessel and the personnel were more than adequately suited for the job at hand.

Diving operations were conducted by Global Diving & Salvage. Two divers were saturated for the duration of the job; other divers acted as surface tenders and made surface jumps to assist the saturation divers on the bottom. The saturation divers lived in a deck decompression chamber which was secured on the stern of the *American Salvor*. They were stored at a depth of 200 feet. They will not decompress until the operation is completed. Decompression will than take three days.

Each morning the saturation divers transferred from the chamber to a diving bell which transported them to the wreck. Their work day was about twelve hours long, not counting transfer time. Upon arrival on the bottom, one saturation diver exited the bell and made excursions on the wreck; the other diver remained inside the bell and tended the hoses. One hundred feet of umbilical hose give the diver sufficient range to explore different work areas. After about six hours the divers changed roles. The divers wore hot-water suits for warmth in the frigid sea. They breathed a mixture of helium and oxygen in which the percentage of oxygen was between 7% and 8%.

Each saturation diver carried a video camera mounted on his helmet. The video camera was hard-wired to two monitors on the *American Salvor*: one in the control van in view of Global's diving superintendent and DSR's supervisor of salvage, Harvey Harrington; the other monitor was located on deck for public viewing. Realtime transmission permitted me to observe the diver's activities continuously, or whenever I chose to watch. Whatever the diver saw, I could see.

The divers established grid lines in the area in which they were working. This enabled them to orient themselves with respect to specific features of the wreck, and to keep a record of where

recovered items were found. They worked primarily fore and aft of the port paddle wheel shaft, where treasure was found in 1996. They also worked abaft the starboard paddle wheel shaft to recover non-treasure artifacts.

Undersea Graphics supplied the one-person submarine *Snooper* for exploration farther afield. Don Siverts, owner and primary operator of the *Snooper*, made daily reconnaissance flights in order to gather information for a drawing he was making of the wreck, and to identify other areas that might produce either treasure or nontreasure artifacts. The *Snooper* was deployed and recovered by a deck crane. The *Snooper* has a depth capability of 750 feet.

Transportation between shore and the *American Salvor* was provided by the twenty-five-foot shuttle boat *Negotiator*, owned and operated by John Nesset with assistance from Captain Pat Wilson. The *Negotiator* also transferred food and supplies.

The weather was ideal for the three days I spent aboard the *American Salvor*. It began to turn bad in the evening of August 24. Rough seas made the transfer from the salvage vessel to the shuttle boat a challenge. It was fortunate that I returned to shore that night, for small craft advisories were posted the next day and shuttle service was suspended. Had I remained on board I would have been trapped there for several days.

I spent only one night on ship. This was because the Coast Guard invoked a limit of twenty-five people. With the ship's crew, the divers, the *Snooper's* crew, and DSR's supervisory personnel, the complement was full before my arrival. In fact, even investors were not permitted to stay on board. After my first day aboard I returned to shore. At the end of my second day aboard, James

Wadsley went ashore in order to allow me to remain overnight. I slept in a sleeping bag which I brought from home for the occasion.

The time I spent onboard the vessel allowed me to observe nearly every facet of the operation. The only activities I did not see were the removal of entangled fishing nets, the rigging of the grid lines, and the recovery of treasure. Treasure had been recovered on the two days prior to my arrival, but coincident with my arrival the work shifted to the recovery of non-treasure artifacts.

Although I did not witness the recovery of treasure, I was present when James Wadsley and David Flohr made an inventory of previously recovered treasure. Treasure items were triply locked in a compartment constructed of steel partitions. The steel door was barred with a lock for which only DSR's principals knew the combination. All four principals were present when the door was unlocked (James Wadsley, David Flohr, Sherman Harris, and Harvey Harrington). The lock also had a Brink's seal. Harvey Harrington unlocked the door.

Inside the compartment was a spare decompression chamber in which the treasure was stowed. The door to the chamber was secured by two chain locks with different combinations. Two DSR principals were required to open the chamber because each knew only one combination. David Flohr and James Wadsley opened these two locks.

Each coin (or clump of coins) was itemized and sealed in a plastic bag in order to retain moisture. An inventory sheet was maintained, and this was cross-referenced by Rob Reedy, the on-site archaeologist who was also present during the inventory

process. The DSR inventory sheet was to be faxed to the court. An exact count of the number of coins recovered could not be made because some clumps were so heavily concreted.

One diver made a surface jump on umbilical hoses in order to move the downline. He did not have a video camera with him. He was on the bottom for forty minutes. He decompressed in the water (on the stage) for two hours, then spent another two hours in a deck decompression chamber (not the one the saturation divers were using, nor the one in which the treasure was stowed). He breathed a mixture of helium and oxygen in which the percentage of oxygen was between 11% and 12%.

I observed the recovery of many non-treasure artifacts. These were brought to the surface in a wire metal basket the size of a small animal cage. The saturation divers loaded artifacts into milk crates, and secured them with packing material so they would not get jostled or broken. The milk crates were then placed in the basket, which was then raised and brought aboard by the same crane that launched the submarine.

Rob Reedy was on hand to supervise the unloading of the artifacts, and to help transport them to the stern of the vessel which had been assigned as his work area. He uncrated the artifacts one at a time, conducted some initial cleaning, then bagged and inventoried each item. Recovered items consisted of dinner plates, cups, saucers, water pitchers, bottles of several types (wine, condiment, pharmaceutical, and so on), an ink well, a possible gravy boat, steam gauges, wooden handles (for chisels or screwdrivers), a glass lantern chimney, a clay pipe, and so on. One item that looked like a cannon ball and was about the size of a twelve pounder was probably a compensating ball from the binnacle; a knob that was recovered with it looked like the bolt that locked the ball to the binnacle arm.

Appendix A

Rob Reedy earmarked one recovered crate, plus some miscellaneous wood material, for return to the wreck. The crate was about 2' x 2' x 3', and contained lengths of wood that might have been chair back supports, although no final determination was made. He kept two lengths of wood, but decided that the entire crate would be difficult to conserve and not worth the effort. He also returned a box of iron nut blanks (that is, unthreaded nuts).

I watched on the video monitor as the diver plucked items out of the silt. The camera panned across fields of debris from which ceramic ware protruded. He picked up pieces that looked interesting, but did not pick up everything, and sometimes put back items that were broken or were duplicates of items already recovered. Thus he took only a sample of what was available. Except for the steam gauges, the recovered items appeared to be part of the *Brother Jonathan's* cargo.

Don Siverts showed me his drawings of the wreck and the locations from which various items had been recovered. His drawings are based upon a compilation of video footage shot in 1993, 1997, and 1997. Harvey Harrington provided background information which explained where and why DSR's efforts were concentrated.

Willard Bascom, who prepared the report on the 1996 operation, was either in Crescent City or onboard the salvage vessel (in accordance with the personnel limitation restraints compelled by the Coast Guard). He has nearly completed writing a book on the *Brother Jonathan*, and is making observations for what he hopes to be the final chapter in the salvage of the wreck.